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UNITED STATES REPORTS

VOLUME 473

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1984

JUNE 27 THROUGH OCTOBER 2, 1985

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

END OF TERM

HENRY C. LIND

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

EDWIN MEESE III, ATTORNEY GENERAL.
CHARLES FRIED, ACTING SOLICITOR GENERAL.
ALEXANDER L. STEVAS, CLERK.[1]
JOSEPH F. SPANIOL, JR., CLERK.[2]
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
STEPHEN G. MARGETON, LIBRARIAN.[3]
PENELOPE A. HAZELTON, ACTING LIBRARIAN.

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[1] Mr. Stevas retired as Clerk effective August 1, 1985. See *post*, p. v.

[2] Mr. Spaniol was appointed Clerk on June 17, 1985, effective August 1, 1985. See 472 U. S. 1013; *post*, p. v.

[3] Mr. Margeton was appointed Librarian on June 17, 1985, effective July 15, 1985. See 472 U. S. 1013.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

RETIREMENT AND APPOINTMENT OF DIRECTOR OF ADMINISTRATIVE OFFICE OF UNITED STATES COURTS AND OF CLERK OF COURT

SUPREME COURT OF THE UNITED STATES

TUESDAY, JULY 2, 1985

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE STEVENS, and JUSTICE O'CONNOR.

THE CHIEF JUSTICE said:

Today's Order List includes the announcement of the appointment of Mr. L. Ralph Mecham as the Director of the Administrative Office of the United States Courts succeeding Mr. William E. Foley, who retired in March of this year. Mr. Mecham will assume the duties of the Office of Director, July 15, 1985. We note for the record our appreciation of the excellent service of Joseph Spaniol as Acting Director since the retirement of Mr. Foley.

I am also authorized to announce the retirement of the Clerk of the Supreme Court of the United States, Mr. Alexander Stevas, as of July 31, 1985. I speak for all the members of the Court, the staff of the Court, and for the Bar of the Court in thanking Mr. Stevas for his dedicated service and in wishing him much happiness and good health in the years ahead.

I am also authorized to announce that Mr. Joseph Spaniol, Jr., Deputy Director of the Administrative Office of the Courts has been appointed Clerk of the Supreme Court effective August 1, to succeed Mr. Stevas.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1984

MAREK ET AL. *v.* CHESNY, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF CHESNY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 83–1437. Argued December 5, 1984—Decided June 27, 1985

Petitioner police officers, in answering a call on a domestic disturbance, shot and killed respondent's adult son. Respondent, in his own behalf and as administrator of his son's estate, filed suit against petitioners in Federal District Court under 42 U. S. C. § 1983 and state tort law. Prior to trial, petitioners made a timely offer of settlement of $100,000, expressly including accrued costs and attorney's fees, but respondent did not accept the offer. The case went to trial and respondent was awarded $5,000 on the state-law claim, $52,000 for the § 1983 violation, and $3,000 in punitive damages. Respondent then filed a request for attorney's fees under 42 U. S. C. § 1988, which provides that a prevailing party in a § 1983 action may be awarded attorney's fees "as part of the costs." The claimed attorney's fees included fees for work performed subsequent to the settlement offer. The District Court declined to award these latter fees pursuant to Federal Rule of Civil Procedure 68, which provides that if a timely pretrial offer of settlement is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." The Court of Appeals reversed.

Held: Petitioners are not liable for the attorney's fees incurred by respondent after petitioners' offer of settlement. Pp. 5–12.

(a) Petitioners' offer was valid under Rule 68. The Rule does not require that a defendant's offer itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs. The drafters' concern was not so much with the particular components of offers, but with the *judgments* to be allowed against defendants. Whether or not the offer recites that costs are included or specifies an amount for costs, the offer has *allowed* judgment to be entered against the defendant both for damages caused by the challenged conduct and for costs. This construction of Rule 68 furthers its objective of encouraging settlements. Pp. 5–7.

(b) In view of the Rule 68 drafters' awareness of the various federal statutes which, as an exception to the "American Rule," authorize an award of attorney's fees to prevailing parties as part of the costs in particular cases, the most reasonable inference is that the term "costs" in the Rule was intended to refer to all costs properly awardable under the relevant substantive statute. Thus, where the underlying statute defines "costs" to include attorney's fees, such fees are to be included as costs for purposes of Rule 68. Here, where § 1988 expressly includes attorney's fees as "costs" available to a prevailing plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68. Rather than "cutting against the grain" of § 1988, applying Rule 68 in the context of a § 1983 action is consistent with § 1988's policies and objectives of encouraging plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. Pp. 7–11.

720 F. 2d 474, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., *post*, p. 12, and REHNQUIST, J., *post*, p. 13, filed concurring opinions. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 13.

Donald G. Peterson argued the cause for petitioners. With him on the brief was *Elizabeth Hubbard*.

Jerrold J. Ganzfried argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, Deputy Assistant Attorney General Kuhl, Katheryn A. Oberly, Robert S. Greenspan*, and *Barbara S. Woodall*.

Victor J. Stone argued the cause for respondent. On the brief was *James D. Montgomery.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether attorney's fees incurred by a plaintiff subsequent to an offer of settlement under Federal Rule of Civil Procedure 68 must be paid by the defendant under 42 U. S. C. § 1988, when the plaintiff recovers a judgment less than the offer.

I

Petitioners, three police officers, in answering a call on a domestic disturbance, shot and killed respondent's adult son. Respondent, in his own behalf and as administrator of his son's estate, filed suit against the officers in the United States District Court under 42 U. S. C. § 1983 and state tort law.

Prior to trial, petitioners made a timely offer of settlement "for a sum, including costs now accrued and attorney's fees,

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida by *Jim Smith*, Attorney General, *Mitchell D. Franks*, and *Linda K. Huber* and *Bruce A. Minnick*, Assistant Attorneys General; for the City of New York by *Frederick A. O. Schwarz, Jr.*, *Leonard Koerner*, *Ronald E. Sternberg*, *Evelyn Jonas*, and *John P. Woods;* and for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Thomas R. Bagby*.

Briefs of *amici curiae* urging affirmance were filed for the Alliance for Justice by *Laura Macklin;* for the American Civil Liberties Union et al. by *Roger Pascal*, *Burt Neuborne*, *E. Richard Larson*, and *Harvey Grossman;* for the Lawyers' Committee for Civil Rights Under Law by *Fred N. Fishman*, *Robert H. Kapp*, *Norman Redlich*, *William L. Robinson*, *Norman J. Chachkin*, *Harold R. Tyler, Jr.*, and *Sara E. Lister;* for the Committee on the Federal Courts of the Association of the Bar of the City of New York by *Sheldon H. Elsen*, *Michael W. Schwartz*, *Sidney S. Rosdeitcher*, *Edmund H. Kerr*, and *John G. Koeltl;* and for the NAACP Legal Defense and Educational Fund, Inc., by *Barry L. Goldstein*, *Julius LeVonne Chambers*, and *Charles Stephen Ralston*.

of ONE HUNDRED THOUSAND ($100,000) DOLLARS." Respondent did not accept the offer. The case went to trial and respondent was awarded $5,000 on the state-law "wrongful death" claim, $52,000 for the § 1983 violation, and $3,000 in punitive damages.

Respondent filed a request for $171,692.47 in costs, including attorney's fees. This amount included costs incurred after the settlement offer. Petitioners opposed the claim for postoffer costs, relying on Federal Rule of Civil Procedure 68, which shifts to the plaintiff all "costs" incurred subsequent to an offer of judgment not exceeded by the ultimate recovery at trial. Petitioners argued that attorney's fees are part of the "costs" covered by Rule 68. The District Court agreed with petitioners and declined to award respondent "costs, including attorney's fees, incurred after the offer of judgment." 547 F. Supp. 542, 547 (ND Ill. 1982). The parties subsequently agreed that $32,000 fairly represented the allowable costs, including attorney's fees, accrued prior to petitioners' offer of settlement.[1] Respondent appealed the denial of postoffer costs.

The Court of Appeals reversed. 720 F. 2d 474 (CA7 1983). The court rejected what it termed the "rather mechanical linking up of Rule 68 and section 1988." *Id.*, at 478. It stated that the District Court's reading of Rule 68 and § 1988, while "in a sense logical," would put civil rights plaintiffs and counsel in a "predicament" that "cuts against the grain of section 1988." *Id.*, at 478, 479. Plaintiffs' attorneys, the court reasoned, would be forced to "think very hard" before rejecting even an inadequate offer, and would be deterred from bringing good-faith actions because of the prospect of losing the right to attorney's fees if a settlement offer more favorable than the ultimate recovery were rejected. *Id.*, at 478–479. The court concluded that "[t]he legislators who enacted section 1988 would not have wanted its effective-

[1] The District Court refused to shift to respondent any costs accrued by petitioners. Petitioners do not contest that ruling.

ness blunted because of a little known rule of court." *Id.*, at 479.

We granted certiorari, 466 U. S. 949 (1984). We reverse.

II

Rule 68 provides that if a timely pretrial offer of settlement is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay *the costs incurred after the making of the offer.*" (Emphasis added.) The plain purpose of Rule 68 is to encourage settlement and avoid litigation. Advisory Committee Note on Rules of Civil Procedure, Report of Proposed Amendments, 5 F. R. D. 433, 483, n. 1 (1946), 28 U. S. C. App., p. 637; *Delta Air Lines, Inc.* v. *August*, 450 U. S. 346, 352 (1981). The Rule prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits. This case requires us to decide whether the offer in this case was a proper one under Rule 68, and whether the term "costs" as used in Rule 68 includes attorney's fees awardable under 42 U. S. C. § 1988.

A

The first question we address is whether petitioners' offer was valid under Rule 68. Respondent contends that the offer was invalid because it lumped petitioners' proposal for damages with their proposal for costs. Respondent argues that Rule 68 requires that an offer must separately recite the amount that the defendant is offering in settlement of the substantive claim and the amount he is offering to cover accrued costs. Only if the offer is bifurcated, he contends, so that it is clear how much the defendant is offering for the substantive claim, can a plaintiff possibly assess whether it would be wise to accept the offer. He apparently bases this argument on the language of the Rule providing that the defendant "may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property

or to the effect specified in his offer, *with costs then accrued*" (emphasis added).

The Court of Appeals rejected respondent's claim, holding that "an offer of the money or property or to the specified effect is, by force of the rule itself, 'with'—that is, plus 'costs then accrued,' whatever the amount of those costs is." 720 F. 2d, at 476. We, too, reject respondent's argument. We do not read Rule 68 to require that a defendant's offer itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs.

The critical feature of this portion of the Rule is that the offer be one that *allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued.* In other words, the drafters' concern was not so much with the particular components of offers, but with the *judgments* to be allowed against defendants. If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount which in its discretion, see *Delta Air Lines, Inc.* v. *August*, *supra*, at 362, 365 (POWELL, J., concurring), it determines to be sufficient to cover the costs. In either case, however, the offer has *allowed* judgment to be entered against the defendant both for damages caused by the challenged conduct and for costs. Accordingly, it is immaterial whether the offer recites that costs are included, whether it specifies the amount the defendant is allowing for costs, or, for that matter, whether it refers to costs at all. As long as the offer does not implicitly or explicitly provide that the judgment *not* include costs, a timely offer will be valid.

This construction of the Rule best furthers the objective of the Rule, which is to encourage settlements. If defendants are not allowed to make lump-sum offers that would, if accepted, represent their total liability, they would under-

standably be reluctant to make settlement offers. As the Court of Appeals observed, "many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff." 720 F. 2d, at 477.

Contrary to respondent's suggestion, reading the Rule in this way does not frustrate plaintiffs' efforts to determine whether defendants' offers are adequate. At the time an offer is made, the plaintiff knows the amount in damages caused by the challenged conduct. The plaintiff also knows, or can ascertain, the costs then accrued. A reasonable determination whether to accept the offer can be made by simply adding these two figures and comparing the sum to the amount offered. Respondent is troubled that a plaintiff will not know whether the offer on the substantive claim would be exceeded at trial, but this is so whenever an offer of settlement is made. In any event, requiring itemization of damages separate from costs would not in any way help plaintiffs know in advance whether the judgment at trial will exceed a defendant's offer.

Curiously, respondent also maintains that petitioners' settlement offer did not exceed the judgment obtained by respondent. In this regard, respondent notes that the $100,000 offer is not as great as the sum of the $60,000 in damages, $32,000 in preoffer costs, and $139,692.47 in claimed postoffer costs. This argument assumes, however, that postoffer costs should be included in the comparison. The Court of Appeals correctly recognized that postoffer costs merely offset part of the expense of continuing the litigation to trial, and should not be included in the calculus. *Id.*, at 476.

B

The second question we address is whether the term "costs" in Rule 68 includes attorney's fees awardable under 42 U. S. C. § 1988. By the time the Federal Rules of Civil

Procedure were adopted in 1938, federal statutes had authorized and defined awards of costs to prevailing parties for more than 85 years. See Act of Feb. 26, 1853, 10 Stat. 161; see generally *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975). Unlike in England, such "costs" generally had not included attorney's fees; under the "American Rule," each party had been required to bear its own attorney's fees. The "American Rule" as applied in federal courts, however, had become subject to certain exceptions by the late 1930's. Some of these exceptions had evolved as a product of the "inherent power in the courts to allow attorney's fees in particular situations." *Alyeska*, *supra*, at 259. But most of the exceptions were found in federal statutes that directed courts to award attorney's fees as part of costs in particular cases. 421 U. S., at 260–262.

Section 407 of the Communications Act of 1934, for example, provided in relevant part that, "[i]f the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit." 47 U. S. C. § 407. There was identical language in § 3(p) of the Railway Labor Act, 45 U. S. C. § 153(p) (1934 ed.). Section 40 of the Copyright Act of 1909, 17 U. S. C. § 40 (1934 ed.), allowed a court to "award to the prevailing party a reasonable attorney's fee as part of the costs." And other statutes contained similar provisions that included attorney's fees as part of awardable "costs." See, *e. g.*, the Clayton Act, 15 U. S. C. § 15 (1934 ed.); the Securities Act of 1933, 15 U. S. C. § 77k(e) (1934 ed.); the Securities Exchange Act of 1934, 15 U. S. C. §§ 78i(e), 78r(a) (1934 ed.).

The authors of Federal Rule of Civil Procedure 68 were fully aware of these exceptions to the American Rule. The Advisory Committee's Note to Rule 54(d), 28 U. S. C. App., p. 621, contains an extensive list of the federal statutes which allowed for costs in particular cases; of the 35 "statutes as to costs" set forth in the final paragraph of the Note, no fewer than 11 allowed for attorney's fees as part of costs. Against this background of varying definitions of "costs," the drafters

of Rule 68 did not define the term; nor is there any explanation whatever as to its intended meaning in the history of the Rule.

In this setting, given the importance of "costs" to the Rule, it is very unlikely that this omission was mere oversight; on the contrary, the most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 "costs." Thus, absent congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68. See, *e. g.*, *Fulps* v. *Springfield, Tenn.*, 715 F. 2d 1088, 1091–1095 (CA6 1983); *Waters* v. *Heublein, Inc.*, 485 F. Supp. 110, 113–117 (ND Cal. 1979); *Scheriff* v. *Beck*, 452 F. Supp. 1254, 1259–1260 (Colo. 1978). See also *Delta Air Lines, Inc.* v. *August*, 450 U. S., at 362–363 (POWELL, J., concurring).

Here, respondent sued under 42 U. S. C. § 1983. Pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, as amended, 42 U. S. C. § 1988, a prevailing party in a § 1983 action may be awarded attorney's fees "as part of the costs." Since Congress expressly included attorney's fees as "costs" available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68. This "plain meaning" interpretation of the interplay between Rule 68 and § 1988 is the only construction that gives meaning to each word in both Rule 68 and § 1988.[2]

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[2] Respondent suggests that *Roadway Express, Inc.* v. *Piper*, 447 U. S. 752 (1980), requires a different result. *Roadway Express*, however, is not relevant to our decision today. In *Roadway*, attorney's fees were sought as part of costs under 28 U. S. C. § 1927, which allows the imposition of costs as a penalty on attorneys for vexatiously multiplying litigation. We held in *Roadway Express* that § 1927 came with its own statutory definition of costs, and that this definition did not include attorney's fees. The critical distinction here is that Rule 68 does not come with a definition of

Unlike the Court of Appeals, we do not believe that this "plain meaning" construction of the statute and the Rule will frustrate Congress' objective in § 1988 of ensuring that civil rights plaintiffs obtain "'effective access to the judicial process.'" *Hensley* v. *Eckerhart*, 461 U. S. 424, 429 (1983), quoting H. R. Rep. No. 94–1558, p. 1 (1976). Merely subjecting civil rights plaintiffs to the settlement provision of Rule 68 does not curtail their access to the courts, or significantly deter them from bringing suit. Application of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer. There is no evidence, however, that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned. Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for "helping to lessen docket congestion" by settling their cases out of court. See H. R. Rep. No. 94–1558, *supra*, at 7.

Moreover, Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits. Civil rights plaintiffs—along with other plaintiffs—who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected. But, since the Rule is neutral, many civil rights plaintiffs will benefit from the offers of settlement encouraged by Rule 68. Some plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation. In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants.

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costs; rather, it incorporates the definition of costs that otherwise applies to the case.

To be sure, application of Rule 68 will require plaintiffs to "think very hard" about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates. This effect of Rule 68, however, is in no sense inconsistent with the congressional policies underlying § 1983 and § 1988. Section 1988 authorizes courts to award only "reasonable" attorney's fees to prevailing parties. In *Hensley* v. *Eckerhart*, *supra*, we held that "the most critical factor" in determining a reasonable fee "is the degree of success obtained." *Id.*, at 436. We specifically noted that prevailing at trial "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Ibid.* In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff—although technically the prevailing party—has not received any monetary benefits from the postoffer services of his attorney. This case presents a good example: the $139,692 in postoffer legal services resulted in a recovery $8,000 less than petitioners' settlement offer. Given Congress' focus on the success achieved, we are not persuaded that shifting the postoffer costs to respondent in these circumstances would in any sense thwart its intent under § 1988.

Rather than "cutting against the grain" of § 1988, as the Court of Appeals held, we are convinced that applying Rule 68 in the context of a § 1983 action is consistent with the policies and objectives of § 1988. Section 1988 encourages plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. There is nothing incompatible in these two objectives.

III

Congress, of course, was well aware of Rule 68 when it enacted § 1988, and included attorney's fees as part of recoverable costs. The plain language of Rule 68 and § 1988 subjects such fees to the cost-shifting provision of Rule 68. Nothing revealed in our review of the policies underlying § 1988 constitutes "the necessary clear expression of congres-

sional intent" required "to exempt . . . [the] statute from the operation of" Rule 68. *Califano* v. *Yamasaki*, 442 U. S. 682, 700 (1979). We hold that petitioners are not liable for costs of $139,692 incurred by respondent after petitioners' offer of settlement.

The judgment of the Court of Appeals is

Reversed.

JUSTICE POWELL, concurring.

In *Delta Airlines, Inc.* v. *August*, 450 U. S. 346 (1981), the offer under Rule 68 stated that it was *"in the amount of $450, which shall include attorney's fees*, together with costs accrued to date." *Id.*, at 365. In a brief concurring opinion, I expressed the view that this offer did not comport with the Rule's requirements. It seemed to me that an offer of judgment should consist of two identified components: (i) the substantive relief proposed, and (ii) costs, including a reasonable attorney's fee. The amount of the fee ultimately should be within the discretion of the court if the offer is accepted. In questioning the form of the offer in *Delta*, I was influenced in part by the fact that it was a Title VII case. I concluded that the "'costs' component of a Rule 68 offer of judgment in a Title VII case must include reasonable attorney's fees accrued to the date of the offer." *Id.*, at 363. My view, however, as to the specificity of the "substantive relief" component of the offer did not depend solely on the fact that *Delta* was a Title VII case.

No other Justice joined my *Delta* concurrence. The Court's decision was upon a different ground. Although I think it the better practice for the offer of judgment expressly to identify the components, it is important to have a Court for a clear interpretation of Rule 68. I noted in *Delta* that "parties to litigation and the public as a whole have an interest—often an overriding one—in settlement rather than exhaustion of protracted court proceedings." *Ibid.* The purpose of Rule 68 is to "facilitat[e] the early resolution of marginal suits in which the defendant perceives the claim to

be without merit, and the plaintiff recognizes its speculative nature." *Ibid.* See also *id.*, at 363, n. 1. We have now agreed as to what specifically is required by Rule 68.

Accordingly, I join the opinion of the Court.

JUSTICE REHNQUIST, concurring.

In *Delta Airlines, Inc.* v. *August*, 450 U. S. 346 (1981), I expressed in dissent the view that the term "costs" in Rule 68 did not include attorney's fees. Further examination of the question has convinced me that this view was wrong, and I therefore join the opinion of THE CHIEF JUSTICE. Cf. *McGrath* v. *Kristensen*, 340 U. S. 162, 176 (1950) (Jackson, J. concurring).

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

The question presented by this case is whether the term "costs" as it is used in Rule 68 of the Federal Rules of Civil Procedure[1] and elsewhere throughout the Rules refers sim-

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[1] Rule 68 provides:

"At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability."

ply to those taxable costs defined in 28 U. S. C. § 1920 and traditionally understood as "costs"—court fees, printing expenses, and the like[2]—or instead includes attorney's fees when an underlying fees-award statute happens to refer to fees "as part of" the awardable costs. Relying on what it recurrently emphasizes is the "plain language" of one such statute, 42 U. S. C. § 1988,[3] the Court today holds that a prevailing civil rights litigant entitled to fees under that statute is *per se* barred by Rule 68 from recovering any fees for work performed after rejecting a settlement offer where he ultimately recovers less than the proffered amount in settlement.

I dissent. The Court's reasoning is wholly inconsistent with the history and structure of the Federal Rules, and its application to the over 100 attorney's fees statutes enacted by Congress will produce absurd variations in Rule 68's op-

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[2] Section 1920 provides:

"A judge or clerk of any court of the United States may tax as costs the following:

"(1) Fees of the clerk and marshal;

"(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

"(3) Fees and disbursements for printing and witnesses;

"(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

"(5) Docket fees under section 1923 of this title;

"(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

[3] Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, as amended, 42 U. S. C. § 1988. That section provides in relevant part that "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

eration based on nothing more than picayune differences in statutory phraseology. Neither Congress nor the drafters of the Rules could possibly have intended such inexplicable variations in settlement incentives. Moreover, the Court's interpretation will "seriously undermine the purposes behind the attorney's fees provisions" of the civil rights laws, *Delta Air Lines, Inc.* v. *August*, 450 U. S. 346, 378 (1981) (REHNQUIST, J., dissenting)—provisions imposed by Congress pursuant to § 5 of the Fourteenth Amendment.[4] Today's decision therefore violates the most basic limitations on our rulemaking authority as set forth in the Rules Enabling Act, 28 U. S. C. § 2072, and as summarized in *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240 (1975). Finally, both Congress and the Judicial Conference of the United States have been engaged for years in considering possible amendments to Rule 68 that would bring attorney's fees within the operation of the Rule. That process strongly suggests that Rule 68 has not previously been viewed as governing fee awards, and it illustrates the wisdom of deferring to other avenues of amending Rule 68 rather than ourselves engaging in "standardless judicial lawmaking." *Delta Air Lines, Inc.* v. *August*, *supra*, at 378 (REHNQUIST, J., dissenting).

I

The Court's "plain language" analysis, *ante*, at 11, goes as follows: Section 1988 provides that a "prevailing party" may recover "a reasonable attorney's fee as part of the costs." Rule 68 in turn provides that, where an offeree obtains a judgment for less than the amount of a previous settlement offer, "the offeree must pay the costs incurred after the making of the offer." Because "attorney's fees" are "costs," the Court concludes, the "plain meaning" of Rule 68 *per se* prohibits a prevailing civil rights plaintiff from recovering fees

[4] See S. Rep. No. 94–1011, pp. 5–6 (1976); H. R. Rep. No. 94–1558, pp. 7, n. 14, 8–9 (1976).

incurred after he rejected the proposed out-of-court settlement. *Ante*, at 9.

The Court's "plain language" approach is, as Judge Posner's opinion for the court below noted, "in a sense logical." 720 F. 2d 474, 478 (CA7 1983). However, while the starting point in interpreting statutes and rules is always the plain words themselves, "[t]he particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense were they intended to be understood or what understanding they convey when used in the particular act."[5] We previously have been confronted with "superficially appealing argument[s]" strikingly similar to those adopted by the Court today, and we have found that they "cannot survive careful consideration." *Roadway Express, Inc.* v. *Piper*, 447 U. S. 752, 758 (1980). So it is here.

In *Roadway Express*, the petitioner argued that under 28 U. S. C. § 1927 (1976 ed.) (which at that time allowed for the imposition of "excess costs" on an attorney who "unreasonably and vexatiously" delayed court proceedings),[6] "costs"

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[5] 2A C. Sands, Sutherland on Statutory Construction § 46.07, p. 110 (4th ed. 1984). See also *United States* v. *Campos-Serrano*, 404 U. S. 293, 298 (1971) ("If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered"); *Lynch* v. *Overholser*, 369 U. S. 705, 710 (1962) ("The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, . . . for 'literalness may strangle meaning'"); *United States* v. *Brown*, 333 U. S. 18, 25–26 (1948) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language"). Cf. *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943) ("words are inexact tools at best").

[6] That section provided that any attorney "who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs." The section was amended after *Roadway Express* to require the payment of "excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Pub. L. 96–349, § 3, 94 Stat. 1156, 28 U. S. C. § 1927.

should be interpreted to include attorney's fees when the underlying fees-award statute provided for fees "as part of the costs." We rejected that argument, concluding that "costs" as it was used in § 1927 had a well-settled meaning limited to the traditional taxable items of costs set forth in 28 U. S. C. § 1920. 447 U. S., at 759–761. We found that Congress has consistently "sought to standardize the treatment of costs in federal courts, to 'make them uniform—make the law explicit and definite,'" and that the petitioner's interpretation "could result in virtually random application of § 1927 on the basis of other laws that do not address the problem of controlling abuses of judicial processes." *Id.*, at 761–762. Specifically, allowing the definition of "costs" to vary depending on the phraseology of the underlying fees-award statute

> "would create a two-tier system of attorney sanctions. . . . Under Roadway's view of § 1927, lawyers in cases brought under those statutes [authorizing fees *as part of* the costs] would face stiffer penalties for prolonging litigation than would other attorneys. There is no persuasive justification for subjecting lawyers in different areas of practice to differing sanctions for dilatory conduct. A court's processes may be as abused in a commercial case as in a civil rights action. Without an express indication of congressional intent, we must hesitate to reach the imaginative outcome urged by Roadway, particularly when a more plausible construction flows from [viewing 'costs' uniformly as limited to those items set forth in § 1920]." *Id.*, at 762–763.

The Court today restricts its discussion of *Roadway* to a single footnote, urging that that case "is not relevant to our decision" because "§ 1927 came with its own statutory definition of costs" whereas "Rule 68 does not come with a definition of costs." *Ante*, at 9–10, n. 2. But this purported "distinction" merely begs the question. As in *Roadway*, the question we face is whether a cost-shifting provision "come[s] with a definition of costs"—that set forth in § 1920 in an effort

"to standardize the treatment of costs in federal courts," *Roadway Express, Inc.* v. *Piper*, *supra*, at 761—or instead may vary widely in meaning depending on the phraseology of the underlying fees-award statute.[7] The parties' arguments in this case and in *Roadway* are virtually interchangeable, and our analysis is not much advanced simply by the conclusory statement that the cases are different.

For a number of reasons, "costs" as that term is used in the Federal Rules should be interpreted uniformly in accordance with the definition of costs set forth in § 1920:

First. The limited history of the costs provisions in the Federal Rules suggests that the drafters intended "costs" to mean only taxable costs traditionally allowed under the common law or pursuant to the statutory predecessor of § 1920.[8]

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[7] Taken to its logical limit, the Court's argument that the Federal Rules come with no "definition of costs" would mean that courts in applying the Rules' costs provisions could altogether ignore § 1920 in defining taxable costs. Surely the Court cannot mean to endorse such a result. The proper question, it seems to me, is instead whether § 1920 sets forth the *only* "definition" of costs for purposes of applying the Rules or whether courts may pick and choose from among other statutes in adding items to the enumeration set forth in § 1920.

[8] Rule 68 modifies the general cost-shifting provisions set forth in Rule 54(d). See *Delta Air Lines, Inc.* v. *August*, 450 U. S. 346, 351–356 (1981); n. 13, *infra*. The Advisory Committee's Notes to Rule 54(d) emphasized that the terms of the statutory predecessor of § 1920 were "unaffected by this rule"—suggesting that the drafters did not intend to alter the uniform definition of costs set forth in that statute. 28 U. S. C. App., p. 621. Moreover, the drafters cited to an article as authority on "the present rule" which emphasized "the fundamental, essential, and common law doctrines and distinctions as to *costs* and *fees*. The distinction between costs and fees should be carefully borne in mind . . . ." Payne, Costs in Common Law Actions in the Federal Courts, 21 Va. L. Rev. 397, 398 (1935) (emphasis in original), cited at 28 U. S. C. App., p. 621. The article continued, stating that the statutory predecessor of § 1920 "was designed to reduce the expense of proceedings in the federal courts *and to secure uniform rules* throughout the United States. The intention of Congress to establish the provisions of the Act of 1853 as the *exclusive* law of costs in

Nowhere was it suggested that the meaning of taxable "costs" might vary from case to case depending on the language of the substantive statute involved—a practice that would have cut against the drafters' intent to create uniform procedures applicable to "*every* action" in federal court. Fed. Rule Civ. Proc. 1.[9]

Second. The Rules provide that "costs" may automatically be taxed by the clerk of the court on one day's notice, Fed. Rule Civ. Proc. 54(d)—strongly suggesting that "costs" were intended to refer only to those routine, readily determinable charges that could appropriately be left to a clerk, and as to which a single day's notice of settlement would be appropriate. Attorney's fees, which are awardable only by the *court*

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the United States courts seems clear under the declarations and interdictions of that act. It would seem that the object . . . was to substitute . . . its own provisions *and secure uniform rules*." *Id.*, at 404 (emphasis added).

[9] "There is probably no provision in the Federal Rules that is more important than this mandate." 4 C. Wright & A. Miller, Federal Practice and Procedure § 1029, p. 127 (1969) (Wright & Miller). See also 2 J. Moore, Federal Practice ¶ 1.13[1], p. 285 (2d ed. 1985) (Moore).

The Court's major argument is that, when Rule 68 was drafted in 1938, there already was a disparity in the phraseology of fees-award statutes such that many provisions authorized the award of fees "as" costs, and that it is therefore "very unlikely" that the drafters intended a uniform definition of costs. *Ante*, at 7–9. As set forth above, however, the limited history strongly indicates that the drafters intended to secure uniform rules on costs and that the uniform definition contained in the statutory predecessor of § 1920 would be "unaffected" by the Rules. See *supra*, at 18 and this page, and n. 8. Moreover, application of the Court's interpretation to statutes in effect in 1938 would have led to inexplicable variations in settlement incentives, see n. 32, *infra*—variations for which the Court has no plausible explanation. In the absence of *any* indication that the drafters or Congress intended a "schizophrenic" application of the Rules, *Delta Air Lines, Inc.* v. *August*, *supra*, at 353, "the most reasonable inference," *ante*, at 9, contrary to the Court's pronouncement, is that Rule 68 was intended to conform to § 1920 and to the general policy of uniformity in applying the Rules.

and which frequently entail lengthy disputes and hearings,[10] obviously do not fall within that category.

Third. When particular provisions of the Federal Rules are *intended* to encompass attorney's fees, they do so *explicitly*. Eleven different provisions of the Rules authorize a court to award attorney's fees as "expenses" in particular circumstances, demonstrating that the drafters knew the difference, and intended a difference, between "costs," "expenses," and "attorney's fees."[11]

Fourth. With the exception of one recent Court of Appeals opinion and two recent District Court opinions, the Court can point to no authority suggesting that courts or attorneys have ever viewed the cost-shifting provisions of Rule 68 as including attorney's fees.[12] Yet Rule 68 has been in effect for 47 years, and potentially could have been applied to numerous fee statutes during this time. "The fact that the defense

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[10] See generally 2 M. Derfner & A. Wolf, Court Awarded Attorney Fees, chs. 23–24 (1984); 3 *id.*, chs. 25–27.

[11] See Fed. Rules Civ. Proc. 11 (signing of pleadings, motions, or other papers in violation of the Rule), 16(f) (noncompliance with rules respecting pretrial conferences), 26(g) (certification of discovery requests, responses, or objections made in violation of Rule), 30(g)(1) (failure of party giving notice of a deposition to attend), 30(g)(2) (failure of party giving notice of a deposition to serve subpoena on witness), 37(a)(4) (conduct necessitating motion to compel discovery), 37(b) (failure to obey discovery orders), 37(c) (expenses on failure to admit), 37(d) (failure of party to attend at own deposition, serve answers to interrogatories, or respond to request for inspection), 37(g) (failure to participate in good faith in framing of a discovery plan), 56(g) (summary-judgment affidavits made in bad faith).

[12] *Ante*, at 9, citing *Fulps* v. *Springfield, Tenn.* 715 F. 2d 1088, 1091–1095 (CA6 1983); *Waters* v. *Heublein, Inc.*, 485 F. Supp. 110, 113–117 (ND Cal. 1979); *Scheriff* v. *Beck*, 452 F. Supp. 1254, 1259–1260 (Colo. 1978). For cases to the contrary, see, *e. g.*, *Dowdell* v. *Apopka, Fla.*, 698 F. 2d 1181, 1188–1189, and n. 2 (CA11 1983); *White* v. *New Hampshire Dept. of Employment Security*, 629 F. 2d 697, 702–703 (CA1 1980), rev'd on other grounds, 455 U. S. 445 (1982); *Piguead* v. *McLaren*, 699 F. 2d 401, 403 (CA7 1983); *Association for Retarded Citizens* v. *Olson*, 561 F. Supp. 495, 498 (ND 1982), modified, 713 F. 2d 1384 (CA8 1983); *Greenwood* v. *Stevenson*, 88 F. R. D. 225, 231–232 (RI 1980).

bar did not develop a practice of seeking" to shift or reduce fees under Rule 68 "is persuasive evidence that trial lawyers have interpreted the Rule in accordance with" the definition of costs in § 1920. *Delta Air Lines, Inc.* v. *August*, 450 U. S., at 360.

Fifth. We previously have held that words and phrases in the Federal Rules must be given a consistent usage and be read *in pari materia*, reasoning that to do otherwise would "attribute a schizophrenic intent to the drafters." *Id.*, at 353. Applying the Court's "plain language" approach consistently throughout the Rules, however, would produce absurd results that would turn statutes like § 1988 on their heads and plainly violate the restraints imposed on judicial rulemaking by the Rules Enabling Act. For example, Rule 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs."[13] Similarly, the *plain* language of Rule 68 provides that a plaintiff covered by the Rule "must pay the costs incurred after the making of the offer"—language requiring the plaintiff to bear both his postoffer costs and the defendant's postoffer costs.[14] If "costs" as used in these provisions were interpreted to include attorney's fees by virtue of the wording of § 1988, losing civil rights plaintiffs would be required by the "plain language" of Rule 54(d) to pay the defendant's attorney's fees, and prevailing plaintiffs falling within Rule 68 would be required to bear the defendant's postoffer attorney's fees.

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[13] Rule 54(d) provides in full:

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

[14] This is precisely how Rule 68 has been applied with respect to ordinary items of taxable costs. See generally 12 Wright & Miller §§ 3001, 3005; 7 Moore ¶ 68.06.

Had it addressed this troubling consequence of its "plain language" approach, perhaps the Court would have acknowledged that such a reading would conflict directly with § 1988, which allows an award of attorney's fees to a prevailing defendant *only* where "the suit was vexatious, frivolous, or brought to harass or embarrass the defendant,"[15] and that the substantive standard set forth in § 1988 therefore overrides the otherwise "plain meaning" of Rules 54(d) and 68. But that is precisely the point, and the Court cannot have it both ways. Unless we are to engage in "schizophrenic" construction, *Delta Air Lines, Inc.* v. *August*, *supra*, at 360, the word "costs" as it is used in the Federal Rules either does or does not allow the inclusion of attorney's fees. If the word "costs" does subsume attorney's fees, this "would alter fundamentally the nature of" civil-rights attorney's fee legislation. *Roadway Express, Inc.* v. *Piper*, 447 U. S., at 762. To avoid this extreme result while still interpreting Rule 68 to include fees in *some* circumstances, however, the Court would have to "select on an ad hoc basis those features of § 1988 . . . that should be read into" Rule 68—a process of construction that would constitute nothing short of "standardless judicial lawmaking." *Ibid.*[16]

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[15] *Hensley* v. *Eckerhart*, 461 U. S. 424, 429, n. 2 (1983). See also *Hughes* v. *Rowe*, 449 U. S. 5, 14–16 (1980) *(per curiam)*; *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 421 (1978); H. R. Rep. No. 94–1558, at 7.

[16] It also might be argued that a defendant may not recover postoffer attorney's fees under the "plain language" of Rule 68 because he is not the "prevailing party" within the meaning of § 1988. We have made clear, however, that a party may "prevail" under § 1988 on some elements of the litigation but not on others. See, *e. g.*, *Hensley* v. *Eckerhart*, *supra*, at 434–437. Thus while the plaintiff would prevail for purposes of preoffer fees, the defendant could be viewed as the prevailing party for purposes of the postoffer fees. Shifting fees to the defendant in such circumstances would plainly violate § 1988 for the reasons set forth above in text, and the substantive standards of § 1988 must therefore override the otherwise "plain language" approach taken by the Court.

Sixth. As with all of the Federal Rules, the drafters intended Rule 68 to have a uniform, consistent application in *all* proceedings in federal court. See *supra*, at 19, and n. 9. In accordance with this intent, Rule 68 should be interpreted to provide uniform, consistent incentives "to encourage the settlement of litigation." *Delta Air Lines, Inc.* v. *August*, *supra*, at 352. Yet today's decision will lead to dramatically different settlement incentives depending on minor variations in the phraseology of the underlying fees-award statutes—distinctions that would appear to be nothing short of irrational and for which the Court has no plausible explanation.

Congress has enacted well over 100 attorney's fees statutes, many of which would appear to be affected by today's decision. As the Appendix to this dissent illustrates, Congress has employed a variety of slightly different wordings in these statutes. It sometimes has referred to the awarding of "attorney's fees *as part of* the costs," to "costs *including* attorney's fees," and to "attorney's fees and *other* litigation costs." Under the "plain language" approach of today's decision, Rule 68 will operate to *include* the potential loss of otherwise recoverable attorney's fees as an incentive to settlement in litigation under these statutes. But Congress frequently has referred in other statutes to the awarding of "costs *and* a reasonable attorney's fee," of "costs *together* with a reasonable attorney's fee," or simply of "attorney's fees" without reference to costs. Under the Court's "plain language" analysis, Rule 68 obviously will *not* include the potential loss of otherwise recoverable attorney's fees as a settlement incentive in litigation under these statutes because they do not refer to fees "as" costs.[17]

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[17] Congress also has enacted statutes providing for the award of "costs and expenses, including attorney's fees." See *infra*, at 24. It is unclear how the "plain language" of these provisions interacts with Rule 68. If "including attorney's fees" is read as referring at least in part to "costs,"

The result is to sanction a senseless patchwork of fee shifting that flies in the face of the fundamental purpose of the Federal Rules—the provision of uniform and consistent procedure in federal courts. Such a construction will "introduce into [Rule 68] distinctions unrelated to its goal . . . and [will] result in virtually random application of the Rule." *Roadway Express, Inc.* v. *Piper*, *supra*, at 761–762. For example, two consumer safety statutes, the Motor Vehicle Information and Cost Savings Act[18] and the Consumer Product Safety Act,[19] were enacted in the same congressional session and are similar in purpose and structure—they both authorize the promulgation of safety standards, provide for private rights of action for violations of their requirements, and authorize awards of attorney's fees. The Motor Vehicle Act, however, authorizes the award of fees *and* costs,[20] while the Consumer Product Safety Act authorizes costs *including* fees.[21] Under today's decision a successful plaintiff will, where the requirements of Rule 68 are otherwise met, be barred from recovering otherwise reasonable attorney's fees for a defective toaster (under the Consumer Product Safety Act) but not for a defective bumper (under the Motor Vehicle Act). Yet nothing in the history of either Act, or in the history of Rule 68, supports such a bizarre differentiation.

The untenable character of such distinctions is further illustrated by reference to the various civil rights laws. For example, suits involving alleged discrimination in housing are

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fees awards under these statutes are subject to Rule 68. If "including attorney's fees" is more naturally read as modifying only the preceding word, "expenses," fees awards under these statutes are not governed by Rule 68.

[18] 86 Stat. 947, as amended, 15 U. S. C. § 1901 *et seq.*

[19] 86 Stat. 1207, as amended, 15 U. S. C. § 2051 *et seq.*

[20] 86 Stat. 955, 15 U. S. C. § 1918(a) ("costs and a reasonable attorney's fee shall be awarded").

[21] 86 Stat. 1226, as amended, 15 U. S. C. §§ 2072(a), 2073 ("costs of suit, including reasonable attorney's fees").

frequently brought under both the Fair Housing Act of 1968[22] and 42 U. S. C. § 1982,[23] and suits involving alleged gender discrimination are often brought under both the Equal Pay Act of 1963[24] and Title VII of the Civil Rights Act of 1964.[25] Yet because of the variations in wording of the attorney's fee provisions of these statutes, today's decision will require that fees be *excluded* from Rule 68 for purposes of the Fair Housing Act[26] but *included* for purposes of § 1982,[27] and that fees be *excluded* for purposes of the Equal Pay Act[28] but *included* for purposes of Title VII.[29] It will be difficult enough to apply Rule 68 to the numerous cases seeking relief under both "fees as costs" and "fees and costs" statutes.[30] More im-

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[22] 82 Stat. 81, 42 U. S. C. § 3601 *et seq.*

[23] That section provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." See generally *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968).

[24] 77 Stat. 56, 29 U. S. C. § 206(d).

[25] 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

[26] 82 Stat. 88, 42 U. S. C. § 3612(c) ("court costs *and* reasonable attorney fees") (emphasis added).

[27] Attorney's fee awards in actions under § 1982 are governed by the terms of § 1988. See n. 3, *supra.*

[28] Attorney's fee awards in actions under the Equal Pay Act are governed by the fee provisions of the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1069, as amended, 29 U. S. C. § 216(b) ("a reasonable attorney's fee . . . and costs of the action") (emphasis added).

[29] 78 Stat. 259, 42 U. S. C. § 2000e–5(k) ("a reasonable attorney's fee as part of the costs") (emphasis added).

[30] As we noted in *Hensley* v. *Eckerhart*, 461 U. S., at 435, many civil rights cases "involve a common core of facts or will be based on related legal theories" that make it difficult to apportion an attorney's fee request among various claims. "Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Ibid.* The Court offers no guidance on how lower courts are to go about applying the *Hensley* standard in cases where Rule 68 requires conflicting results on closely related claims.

portantly, there is absolutely no reason to believe that either Congress or the drafters of the Rules were more eager to induce settlement of § 1982 fair-housing litigation than Fair Housing Act litigation,[31] or that they intended sterner settlement incentives in Title VII gender-discrimination cases than in Equal Pay Act gender-discrimination cases.[32]

Moreover, many statutes contain several fees-award provisions governing actions arising under different subsections, and the phraseology of these provisions sometimes differs slightly from section to section. It is simply preposterous to think that Congress or the drafters of the Rules intended to sanction differing applications of Rule 68 depending on which particular subsection of, *inter alia*, the Privacy Act of 1974,[33] the Home Owners' Loan Act of 1933,[34] the Outer Continental

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[31] In fact, the Senate Report to § 1988 specifically addressed the interplay between the Fair Housing Act and § 1982 and emphasized Congress' intent to abolish the "anomalous gaps" between the two statutes and to make them "consistent" with respect to attorney's fee awards. S. Rep. No. 94–1011, at 4.

[32] With respect to fees-award statutes enacted prior to 1938—which the Court relies on as evidence of the drafters' and Congress' intent to sanction a chameleonic definition of "costs," *ante*, at 8–9, the same inexplicable scheme would result. For example, the FLSA, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*, and the Railway Labor Act of 1926, 44 Stat. 577, 45 U. S. C. § 151 *et seq.*, are both designed to regulate the hours and wages of covered employees. Both provide for private causes of action and for the recovery of reasonable attorney's fees. But the FLSA provides for fees *and* costs, 52 Stat. 1069, 29 U. S. C. § 216(b), whereas the Railway Labor Act provides for fees *as part of* the costs, 44 Stat. 578, 45 U. S. C. § 153. The Court can point to nothing suggesting that Congress intended for similarly situated employees to be subject to different attorney's fee standards under these statutes.

[33] Compare Privacy Act of 1974, 5 U. S. C. §§ 552a(g)(2)(B), 552a(g)(3)(B) ("reasonable attorney fees and other litigation costs") with 5 U. S. C. § 552a(g)(4) ("costs of the action together with reasonable attorney fees").

[34] Compare Home Owners' Loan Act of 1933, 48 Stat. 132, as amended, 12 U. S. C. § 1464(q)(3) ("cost of suit, including a reasonable attorney's fee")

Shelf Lands Act Amendments of 1978,[35] or the Interstate Commerce Act,[36] the plaintiff happened to invoke.

In sum, there is nothing in the history and structure of the Rules or in the history of any of the underlying attorney's fee statutes to justify such incomprehensible distinctions based simply on fine linguistic variations among the underlying fees-award statutes—particularly where, as in *Roadway Express*, the cost provision can be read as embodying a *uniform* definition derived from § 1920. As partners with Congress, we have a responsibility not to carry "plain language" constructions to the point of producing "untenable distinctions and unreasonable results." *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 71 (1982). See also n. 5, *supra*. As JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE and Justice Stewart, cogently reasoned in *Delta Air Lines, Inc.* v. *August*, 450 U. S., at 378 (dissenting opinion), interpreting Rule 68 to allow a "two-tier system of cost-shifting" would attribute "woode[n] and pervers[e]" motives to Congress and to the drafters of the Rules; "[n]o persuasive justification exists for subjecting these plaintiffs to differing penalties for failure to accept a Rule 68 offer and no persuasive justification can be offered as to how such a reading of Rule 68 would in any way further the intent of the Rule which is to encourage settlement" on a uniform basis.[37]

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with *id.*, 48 Stat. 132, as amended, 12 U. S. C. § 1464(d)(8)(A) ("reasonable expenses and attorneys' fees").

[35] Compare Outer Continental Shelf Lands Act Amendments of 1978, 92 Stat. 657, 43 U. S. C. § 1349(a)(5) ("costs of litigation, including reasonable attorney and expert witness fees") with *id.*, 92 Stat. 657, 684, 43 U. S. C. §§ 1349(b)(2) ("damages . . . including reasonable attorney and expert witness fees"), 1818(c)(1)(C) ("court costs . . . and attorneys' fees").

[36] Compare Interstate Commerce Act, 49 U. S. C. § 11705(d)(3) ("attorney's fee . . . as a part of the costs") with 49 U. S. C. § 11708(c) ("reasonable attorney's fee . . . in addition to costs").

[37] The majority in *Delta Air Lines* did not reach the issue of Rule 68's application to attorney's fees. THE CHIEF JUSTICE (implicitly) and JUS-

II

A

Although the Court's opinion fails to discuss any of the problems reviewed above, it does devote some space to arguing that its interpretation of Rule 68 "is in no sense inconsistent with the congressional policies underlying § 1983 and § 1988." *Ante*, at 11. The Court goes so far as to assert that its interpretation fits in smoothly with § 1988 as interpreted by *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983). *Ante*, at 11.

The Court is wrong. Congress has instructed that attorney's fee entitlement under § 1988 be governed by a *reasonableness* standard.[38] Until today the Court always has recognized that this standard precludes reliance on any mechanical "bright-line" rules automatically denying a portion of fees, acknowledging that such "mathematical approach[es]" provide "little aid in determining what is a reasonable fee in light of all the relevant factors." 461 U. S., at 435–436, n. 11. Although the starting point is always "the number of hours *reasonably* expended on the litigation," this "does not end the inquiry": a number of considerations set forth in the legislative history of § 1988 "may lead the district court to adjust the fee upward or downward." *Id.*, at 433–434 (emphasis added).[39] We also have emphasized that

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TICE REHNQUIST (explicitly) have today repudiated their views in *Delta Air Lines*. See *ante*, at 8–9; *ante*, at 13 (REHNQUIST, J., concurring).

[38] S. Rep. No. 94-1011, at 6; H. R. Rep. No. 94-1558, at 8–9.

[39] Among the factors that Congress intended courts to consider are "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length

the district court "necessarily has discretion in making this equitable judgment" because of its "superior understanding of the litigation." *Id.*, at 437. Section 1988's reasonableness standard is, in sum, "acutely sensitive to the merits of an action and to antidiscrimination policy." *Roadway Express, Inc.* v. *Piper*, 447 U. S., at 762.

Rule 68, on the other hand, is not "sensitive" at all to the merits of an action and to antidiscrimination policy. It is a mechanical *per se* provision automatically shifting "costs" incurred after an offer is rejected, and it deprives a district court of *all* discretion with respect to the matter by using "the strongest verb of its type known to the English language—'must.'" *Delta Air Lines, Inc.* v. *August*, *supra*, at 369. The potential for conflict between § 1988 and Rule 68 could not be more apparent.[40]

Of course, a civil rights plaintiff who *unreasonably* fails to accept a settlement offer, and who thereafter recovers less than the proffered amount in settlement, is barred under § 1988 itself from recovering fees for unproductive work performed in the wake of the rejection. This is because "the extent of a plaintiff's success is *a* crucial factor in determining the proper amount of an award of attorney's fees," 461 U. S., at 440 (emphasis added); hours that are "excessive, redundant, or otherwise unnecessary" must be excluded from that calculus, *id.*, at 434. To this extent, the results might sometimes be the same under either § 1988's reasonableness inquiry or the Court's wooden application of Rule 68. Had the

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of the professional relationship with the client; and (12) awards in other cases." *Hensley* v. *Eckerhart*, 461 U. S., at 430, n. 3. See also H. R. Rep. No. 94–1558, at 8.

[40] It might be argued that Rule 68's offer-of-judgment provisions merely serve to define one aspect of "reasonableness" within the meaning of *Hensley* v. *Eckerhart*, *supra*. This argument is foreclosed by Congress' rejection of *per se* "mathematical approach[es]" that would "end the inquiry" without allowing consideration of "all the relevant factors." *Id.*, at 433, 435–436, n. 11.

Court allowed the Seventh Circuit's remand in the instant case to stand, for example, the District Court after conducting the appropriate inquiry might well have determined that much or even all of the respondent's postoffer fees were unreasonably incurred and therefore not properly awardable.

But the results under § 1988 and Rule 68 will *not* always be congruent, because § 1988 mandates the careful consideration of a broad range of other factors and accords appropriate leeway to the district court's informed discretion. Contrary to the Court's protestations, it is not at all clear that "[t]his case presents a good example" of the smooth interplay of § 1988 and Rule 68, *ante*, at 11, because there has never been an evidentiary consideration of the reasonableness or unreasonableness of the respondent's fee request. It *is* clear, however, that under the Court's interpretation of Rule 68 a plaintiff who ultimately recovers only slightly less than the proffered amount in settlement will *per se* be barred from recovering trial fees even if he otherwise "has obtained excellent results" in litigation that will have far-reaching benefit to the public interest. *Hensley* v. *Eckerhart*, *supra*, at 435. Today's decision necessarily will require the disallowance of some fees that otherwise would have passed muster under § 1988's reasonableness standard,[41] and there is *nothing* in § 1988's legislative history even vaguely suggesting that Congress intended such a result.[42]

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[41] Indeed, the "plain language" of § 1988 authorizes the inclusion as "costs" only of those attorney's fees that have been determined to be "reasonable," see n. 3, *supra*, so the cost-shifting provisions of Rule 68 necessarily will come into play only with respect to reasonable attorney's fees.

[42] Given that Congress enumerated factors to consider in applying the reasonableness standard, see nn. 4, 39, *supra*, and given that the *per se* provisions of Rule 68 were nowhere mentioned in the legislative history, there is no basis to believe that Congress intended to modify the reasonableness standard in the context of settlement offers. Moreover, as we previously have noted, Congress' use of the word "costs" in § 1988 had one purpose and one purpose only: to permit an award of attorney's fees against a State notwithstanding the Eleventh Amendment. See *Hutto*

The Court argues, however, that its interpretation of Rule 68 "is neutral, favoring neither plaintiffs nor defendants." *Ante*, at 10. This contention is also plainly wrong. As the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure has noted twice in recent years, Rule 68 "is a 'one-way street,' available only to those defending against claims and not to claimants."[43] Interpreting Rule 68 in its current version to include attorney's fees will lead to a number of skewed settlement incentives that squarely conflict with Congress' intent. To discuss but one example, Rule 68 allows an offer to be made any time after the complaint is filed and gives the plaintiff only 10 days to accept or reject. The Court's decision inevitably will encourage defendants who know they have violated the law to make "low-ball" offers immediately after suit is filed and before plaintiffs have been able to obtain the information they are entitled to by way of discovery to assess the strength of their claims and the reasonableness of the offers. The result will put severe pressure on plaintiffs to settle on the basis of inadequate information in order to avoid the risk of bearing all of their fees even if reasonable discovery might reveal that the defendants were subject to far greater liability. Indeed, because Rule 68 offers may be made recurrently without limitation, defendants will be well advised to make ever-slightly larger offers throughout the discovery process and before plaintiffs have conducted all reasonably necessary discovery.

This sort of so-called "incentive" is fundamentally incompatible with Congress' goals. Congress intended for "private citizens . . . to be able to assert their civil rights" and for "those who violate the Nation's fundamental laws" not to be

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v. *Finney*, 437 U. S. 678, 693–695 (1978); S. Rep. No. 94–1011, at 5; H. R. Rep. No. 94–1558, at 7.

[43] Advisory Committee's Note to Proposed Amendment to Rule 68, 98 F. R. D. 339, 363 (1983); Advisory Committee's Note to Proposed Amendment to Rule 68, 102 F. R. D. 407, 434 (1984).

able "to proceed with impunity."[44] Accordingly, civil rights plaintiffs "'appear before the court cloaked in a mantle of public interest'"; to promote the "*vigorous* enforcement of modern civil rights legislation," Congress has directed that such "private attorneys general" shall not "be deterred from bringing good faith actions to vindicate the fundamental rights here involved."[45] Yet requiring plaintiffs to make wholly uninformed decisions on settlement offers, at the risk of *automatically* losing all of their postoffer fees no matter what the circumstances and notwithstanding the "excellent"[46] results they might achieve after the full picture emerges, will work just such a deterrent effect.[47]

Other difficulties will follow from the Court's decision. For example, if a plaintiff recovers less money than was offered before trial but obtains potentially far-reaching injunctive or declaratory relief, it is altogether unclear how the Court intends judges to go about quantifying the "value" of the plaintiff's success.[48] And the Court's decision raises

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[44] S. Rep. No. 94–1011, at 2.

[45] H. R. Rep. No. 94–1558, at 6; S. Rep. No. 94–1011, at 4–5 (emphasis added). See generally *Northcross* v. *Memphis Board of Education*, 412 U. S. 427, 428 (1973) *(per curiam)*; *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 401–402 (1968) *(per curiam)*.

[46] *Hensley* v. *Eckerhart*, 461 U. S., at 435.

[47] The Judicial Conference Advisory Committee on the Federal Rules has emphasized the unfairness of forcing a party to make such a decision before "enough discovery has been had to appraise the strengths and weaknesses of a claim or defense," and thus has proposed extension of Rule 68 to attorney's fees only in connection with measures to ensure that the offeree has all "information to which it would be entitled by way of discovery under the rules to appraise the fairness of the offer." Advisory Committee's Note to Proposed Amendment to Rule 68, 102 F. R. D., at 434–435.

[48] For example, a plaintiff who is unable to prove actual damages at trial and recovers only nominal damages of $1, but who nevertheless demonstrates the unconstitutionality of the challenged practice and obtains an injunction, is surely a "prevailing party" within the meaning of § 1988. If the plaintiff had earlier rejected an offer of $500 to "get rid" of the controversy, the damages portion of his suit will fall within Rule 68 as interpreted

additional problems concerning representation and conflicts of interest in the context of civil rights class actions.[49] These are difficult policy questions, and I do not mean to suggest

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by today's decision. Yet we previously have emphasized that "a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." *Hensley* v. *Eckerhart*, *supra*, at 435–436, n. 11. See also 461 U. S., at 445, n. 5 (BRENNAN, J., concurring in part and dissenting in part) ("Civil rights remedies often benefit a large number of persons, many of them not involved in the litigation, making it difficult both to evaluate what a particular lawsuit is really worth to those who stand to gain from it and to spread the costs of obtaining relief among them. . . . [The] problem is compounded by the fac[t] that monetary damages are often not an important part of the recovery sought under the statutes enumerated in § 1988"). Although courts must therefore evaluate the "value" of nonpecuniary relief before deciding whether the "judgment" was "more favorable than the offer" within the meaning of Rule 68, the uncertainty in making such assessments surely will add pressures on a plaintiff to settle his suit even if by doing so he abandons an opportunity to obtain potentially far-reaching nonmonetary relief—a discouraging incentive entirely at odds with Congress' intent. See S. Rep. No. 94–1011, at 5–6; H. R. Rep. No. 94–1558, at 8–9.

Of course, the difficulties in assessing the "value" of nonpecuniary relief are inherent in Rule 68's operation whether or not the Rule applies to attorney's fees. But when the Rule was interpreted simply as affecting at most several hundred or several thousand dollars of traditionally taxable costs, these inherent problems were of little practical significance. Now that Rule 68 applies in some situations to the vital question of attorney's fees, these problems will assume major significance.

[49] Like the question of injunctive relief, see n. 48, *supra*, these problems are inherent in Rule 68 but were inconsequential so long as the operation of the Rule was limited to taxable costs as defined in 28 U. S. C. § 1920. Now that the Rule has been extended to many attorney's fee provisions, these difficulties can be expected to create substantial problems in administering class actions. "[S]uits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs." *General Telephone Co.* v. *Falcon*, 457 U. S. 147, 157 (1982). Rule 68 makes no distinctions between individual and class actions. Yet, as the Advisory Committee recently has cautioned, in the class-action context "[an] offeree's rejection would burden a named representative-offeree with the risk of exposure to heavy liability [for costs and expenses] that could

that stronger settlement incentives would necessarily conflict with the effective enforcement of the civil rights laws. But contrary to the Court's 4-paragraph discussion, the policy considerations do not all point in one direction, and the question of whether and to what extent attorney's fees should be included within Rule 68 has provoked sharp debate in Congress, in the Advisory Committee on the Federal Rules, and among commentators.[50] The Court has offered some inter-

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not be recouped from unnamed class members. . . . [This] could lead to a conflict of interest between the named representatives and other members of the class." Advisory Committee's Note to Proposed Amendment to Rule 68, 102 F. R. D., at 436.

Moreover, Rule 23(e) requires the court's approval before a class action is compromised; the Rule protects class members "from unjust or unfair settlements affecting their rights by representatives who lose interest or are able to secure satisfaction of their individual claims by compromise." *Moreland* v. *Rucker Pharmacal Co.*, 63 F. R. D. 611, 615 (WD La. 1974). Yet Rule 68 does not mesh with such careful supervision. Its "plain language" requires simply that upon the plaintiff's acceptance "the clerk *shall* enter judgment."

In addition, Rule 68 sets a nondiscretionary 10-day limit on the plaintiff's power of acceptance—a virtually impossible amount of time in many cases to consider the likely merits of complex claims of relief, give notice to class members, and secure the court's approval.

[50] In addition to the sources cited in nn. 57, 59, and 61, *infra*, see, *e. g.*, Branham, Offer of Judgment and Rule 68: A Response to the Chief Justice, 18 John Marshall L. Rev. 341 (1985); Fiss, Comment, Against Settlements, 93 Yale L. J. 1073 (1984); Shavell, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J. Legal Studies 55 (1982); Simon, Rule 68 at the Crossroads: The Relationship Between Offer of Judgment and Statutory Attorney's Fees, 53 U. Cin. L. Rev. 889 (1984); Notes, The Impact of Proposed Rule 68 on Civil Rights Litigation, 84 Colum. L. Rev. 719 (1984); Note, Rule 68: A "New" Tool for Litigation, 1978 Duke L. J. 889; Offer of Judgment and Statutorily Authorized Attorney's Fees: A Reconciliation of the Scope and Purpose of Rule 68, 16 Ga. L. Rev. 482 (1982); The 'Offer of Judgment' Rule in Employment Discrimination Actions: A Fundamental Incompatibility, 10 Golden Gate L. Rev. 963 (1980); Notes, The Proposed Amendment to Federal Rule of Civil Procedure 68: Toughening the Sanctions, 70 Iowa L. Rev. 237 (1984).

esting arguments based on an economic analysis of settlement incentives and aggregate results. *Ante*, at 10. But I believe Judge Posner had the better of this argument in concluding that the incentives created by interpreting Rule 68 in its current form to include attorney's fees would "cu[t] against the grain of section 1988," and that in any event a modification of Rule 68 to encompass fees is for Congress, not the courts. 720 F. 2d, at 479.

B

Indeed, the judgment of the Court of Appeals below turned on its determination that an interpretation of Rule 68 to include attorney's fees is beyond the pale of the judiciary's rulemaking authority. *Ibid.* Congress has delegated its authority to this Court "to prescribe by general rules . . . the practice and procedure of the district courts and courts of appeals of the United States in civil actions." 28 U. S. C. § 2072.[51] This grant is limited, however, by the condition that "[s]uch rules shall not abridge, enlarge or modify any substantive right." *Ibid.* The right to attorney's fees is "substantive" under any reasonable definition of that term. Section 1988 was enacted pursuant to § 5 of the Fourteenth Amendment, and the House and Senate Reports recurrently emphasized that "fee awards are an integral part of the *remedies* necessary to obtain . . . compliance" with the

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[51] Section 2072 provides in relevant part:

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

civil rights laws and to redress violations.[52] Statutory attorney's fees remedies such as that set forth in § 1988 "are far more like new causes of action tied to specific rights than like background procedural rules governing any and all litigation." *Hensley* v. *Eckerhart*, 461 U. S., at 443, n. 2 (BRENNAN, J., concurring in part and dissenting in part). See also 720 F. 2d, at 479 (§ 1988 "does not make the litigation process more accurate and efficient for both parties; even more clearly than the statute of limitations [at issue in *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949)], it is designed instead to achieve a substantive objective—compliance with the civil rights laws").[53]

As construed by the Court today, Rule 68 surely will operate to "abridge" and to "modify" this statutory right to reasonable attorney's fees. "The test must be whether a rule really regulates *procedure*,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them," or instead operates to abridge a substantive right "in the guise of regulating procedure." *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 10, 14 (1941) (emphasis added); see also *Hanna* v. *Plumer*, 380 U. S. 460, 464–465 (1965). Unlike those provisions of the Federal Rules that explicitly authorize an award of attorney's fees, Rule 68 is not addressed to bad-faith or unreasonable litigation conduct. The courts always have had inherent authority to assess fees against parties who act "in bad faith, vexatiously, wantonly,

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[52] S. Rep. No. 94–1011, at 5 (emphasis added). See also *id.*, at 2–4; H. R. Rep. No. 94–1558, at 1; *Maine* v. *Thiboutot*, 448 U. S. 1, 11 (1980).

[53] "The most helpful way . . . of defining a substantive rule—or more particularly a substantive right, which is what the Act refers to—is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process." Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 725 (1974).

or for oppressive reasons," *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S., at 258–259, and the assessment of fees against parties whose *unreasonable* conduct has violated the rules of litigation falls comfortably into the courts' authority to administer "remedy and redress for disregard or infraction" of those rules, *Sibbach* v. *Wilson & Co.*, *supra*, at 14.

Rule 68, on the other hand, contains no reasonableness component. See *supra*, at 29. As interpreted by the Court, it will operate to divest a prevailing plaintiff of fees to which he otherwise might be entitled under the reasonableness standard simply because he guessed wrong, or because he did not have all information reasonably necessary to evaluate the offer, or because of unforeseen changes in the law or evidence after the offer. The Court's interpretation of Rule 68 therefore clearly collides with the congressionally prescribed substantive standards of § 1988, and the Rules Enabling Act requires that the Court's interpretation give way.

If it had addressed this central issue, perhaps the Court would have reasoned that Rule 68 as interpreted to include attorney's fees is merely a procedural device designed to further the important policy of encouraging efficient and prompt resolution of disputes. With all respect, such refashioning of settlement incentives is squarely foreclosed by the Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, which held that it is "inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation." 421 U. S., at 247. Beyond a handful of "limited circumstances" that do not encompass today's decision,[54] "it is

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[54] Those exceptions include recovery of attorney's fees from a common fund, and recovery of attorney's fees where the opposing party has acted in bad faith or in willful disobedience of a court order. See, *e. g.*, *Summit Valley Industries, Inc.* v. *Carpenters*, 456 U. S. 717, 721 (1982); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 257–259 (1975).

apparent that the circumstances under which attorney's fees are to be awarded *and the range of discretion of the courts in making these awards* are matters for Congress to determine," *id.*, at 257, 262 (emphasis added), and that "courts are not free to fashion drastic new rules with respect to the allowance" or disallowance of attorney's fees, *id.*, at 269. By permitting a mechanical *per se* rule to supplant the congressionally prescribed reasonableness standard of § 1988, and by divesting courts of the discretion Congress intended them to exercise, the Court has assumed a forbidden "roving authority" to "make major inroads on a policy matter that Congress has reserved for itself." *Id.*, at 260, 269. It matters not whether such "roving authority" is exercised on a case-by-case basis or, as here, in interpreting a Federal Rule promulgated pursuant to Congress' delegation of rulemaking authority: in either event, the result is to "abridge" and to "modify" the substance of § 1988 "in the guise of regulating procedure." *Sibbach* v. *Wilson & Co.*, *supra*, at 10.[55]

III

For several years now both the Judicial Conference and Congress have been engaged in an extensive reexamination of Rule 68 and have considered numerous proposals to amend the Rule to include attorney's fees. The Advisory Committee on the Federal Rules initially proposed an amendment to Rule 68 in August 1983 that would have applied equally to plaintiffs and defendants and that would have left application of the Rule's fee provisions in the courts' informed discre-

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[55] "It would be untenable to assert that Congress, although determined to prevent the courts through judicial interpretation from 'mak[ing] major inroads on a policy matter that Congress has reserved for itself,' would approve of the identical result if achieved through judicial rulemaking." Note, The Conflict Between Rule 68 and the Civil Rights Attorneys' Fee Statute: Reinterpreting the Rules Enabling Act, 98 Harv. L. Rev. 828, 844 (1985), quoting *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, at 269.

tion.[56] The proposal received extensive criticism[57] and subsequently was replaced with a revised version in September 1984. The attorney's fee provisions of that proposal would

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[56] The proposed Rule provided:

"At any time more than 30 days before the trial begins, any party may serve upon an adverse party an offer, denominated as an offer under this rule, to settle a claim for the money or property or to the effect specified in his offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 30 days unless a court authorizes earlier withdrawal. An offer not accepted in writing within 30 days shall be deemed withdrawn. Evidence of an offer is not admissible except in a proceeding to enforce a settlement or to determine costs and expenses.

"If the judgment finally entered is not more favorable to the offeree than an unaccepted offer that remained open 30 days, the offeree must pay the costs and expenses, including reasonable attorneys' fees, incurred by the offeror after the making of the offer, and interest from the date of the offer on any amount of money that a claimant offered to accept to the extent such interest is not otherwise included in the judgment. The amount of the expenses and interest may be reduced to the extent expressly found by the court, with a statement of reasons, to be excessive or unjustified under all of the circumstances. In determining whether a final judgment is more or less favorable to the offeree than the offer, the costs and expenses of the parties shall be excluded from consideration. Costs, expenses, and interest shall not be awarded to an offeror found by the court to have made an offer in bad faith.

"The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of settlement under this rule, which shall be effective for such period of time, not more than 30 days, as is authorized by the court. This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendment to the Federal Rules of Civil Procedure (Aug. 1983), reprinted in 98 F. R. D. 337, 361–363 (1983).

[57] See generally Proposed Amendments to the Federal Rules of Civil Procedure: Hearings before the Advisory Committee on Civil Rules of the Judicial Conference of the United States (Washington, D. C., Jan. 18, 1984); Proposed Amendments to the Federal Rules of Civil Procedure:

apply only if a court determined that "an offer was rejected unreasonably," and the proposal sets forth detailed factors for assessing the reasonableness of the rejection.[58] Public

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Hearings before the Advisory Committee of Federal Rules of Civil Procedure of the United States Judicial Conference (Los Angeles, Cal., Feb. 3, 1984).

[58] The revised proposed Rule 68 provides:

"At any time more than 60 days after the service of the summons and complaint on a party but not less than 90 days (or 75 days if it is a counter-offer) before trial, either party may serve upon the other party but shall not file with the court a written offer, denominated as a[n] offer under this rule, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 60 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. An offer that remains open may be accepted or rejected in writing by the offeree. An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule.

"If, upon a motion by the offeror within 10 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

"In determining the amount of any sanction to be imposed under this rule the court also shall take into account (1) the extent of the delay, (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection, (3) the interest that could have been earned at prevailing rates on the amount

hearings on this proposed amendment were held only several months ago.[59]

In the meantime, numerous revisions of § 1988 have been proposed in Congress in recent years. A 1981 proposal would have imposed a rule similar to that adopted by the Court today,[60] but it drew sharp opposition during legislative hearings[61] and never was voted out of Subcommittee. Subsequent proposals to the same effect have had a similar fate.[62] In 1984, legislation was introduced that would have adopted the same rule but subject to the qualification that the failure to accept a settlement offer "was not reasonable at the time

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that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment, and (4) the burden of the sanction on the offeree.

"This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Sept. 1984), reprinted in 102 F. R. D. 407, 432–433 (1985).

[59] See generally Proposed Amendments to the Federal Rules of Civil Procedure: Hearings before the Standing Committee on Rules of Practice and Procedure and the Advisory Committees on Civil and Criminal Rules of the Judicial Conference of the United States (Washington, D. C., Feb. 1, 1985); Proposed Amendments to the Federal Rules of Civil Procedure: Hearings before the Standing Committee on Rules of Practice and Procedure and the Advisory Committees on Civil and Criminal Rules of the Judicial Conference of the United States (San Francisco, Cal., Feb. 21, 1985).

[60] During Subcommittee hearings, Senator Hatch submitted a proposed amendment to S. 585, 97th Cong., 1st Sess. (1981), § 2(c) of which would have provided: "No fee shall be awarded under [§ 1988] as compensation for that part of litigation subsequent to a declined offer of settlement when such offer was as substantially favorable to the prevailing party as the relief ultimately awarded by the court." Attorney's Fees Awards: Hearings on S. 585 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., 13 (1982).

[61] See *id.*, at 17–18, 29–31, 51, 65–66, 72. See also Municipal Liability Under 42 U. S. C. § 1983: Hearings on S. 585, *supra*.

[62] See, *e. g.*, S. 141, 98th Cong., 1st Sess. (1983); H. R. 721, 99th Cong., 1st Sess. (1985).

such failure occurred."[63] Hearings were held on this legislation,[64] but it too never was voted out of Subcommittee.

This activity is relevant in two respects. First, it rather strongly suggests that neither the Advisory Committee nor Congress has viewed Rule 68 as currently governing attorney's fees, else the proposals to amend Rule 68 to include attorney's fees would largely be unnecessary. Second, the Committee and Congress have given close consideration to a broad range of troubling issues that would be raised by application of Rule 68 to attorney's fees, such as (1) whether to import a reasonableness standard into Rule 68, (2) whether and to what extent district courts should have discretion in applying the Rule, (3) the need to revise Rule 68 so as to ensure that offerees have had sufficient time and discovery to evaluate the strength of their cases and the reasonableness of settlement offers, (4) application of the Rule to suits for nonpecuniary relief, (5) application of the Rule to class-action litigation, (6) conflicts of interest between attorneys and clients that the Rule might create, and (7) the precise nature and scope of the sanction. Many of the proposals discussed above have been carefully crafted to address these problems. See nn. 56, 58, and 63, *supra*.

Congress and the Judicial Conference are far more institutionally competent than the Court to resolve this matter.

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[63] S. 2802, § 8(2), 98th Cong., 2d Sess. (1984):

"No award of attorney's fees and related expenses subject to the provisions of this Act may be made—

. . . . .

"(2) for services performed subsequent to the time a written offer of settlement is made to a party, if the offer is not accepted and a court or administrative officer finds that—

"(A) the relief finally obtained by the party is not more favorable to the party than the offer of settlement, and

"(B) the failure of the party to accept the offer of settlement was not reasonable at the time such failure occurred."

[64] See Legal Fees Equity Act: Hearings on S. 2802 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 2d Sess. (1984).

Because the issue before us at the very least is ambiguous, and because the "plain language" approach leads to so many inexplicable inconsistencies in the operation of the Rules and the substantive fees-award statutes, the Court should have stayed its hand and allowed these other avenues for amending Rule 68 to be pursued. Under these circumstances, the Court's decision to the contrary constitutes poor judicial administration as well as poor law, and it renders even more imperative the need for Congress and the Judicial Conference to resolve this problem with dispatch.

APPENDIX TO OPINION OF BRENNAN, J., DISSENTING

Congress has enacted well over 100 fee-shifting statutes, which typically fall into three broad categories:

(A) *Statutes that refer to attorney's fees "as part of the costs."* Variations include "attorney's fees to be taxed and collected as part of the costs," "costs including attorney's fees," and "attorney's fees and other litigation costs." Under the Court's "plain language" approach, these various formulations all "defin[e] 'costs' to include attorney's fees." *Ante*, at 9. Thus where an action otherwise is governed by Rule 68, attorney's fees that are potentially awardable under these statutes "are to be included as costs for purposes of Rule 68." *Ibid.*

(B) *Statutes that do not refer to attorney's fees as part of the costs.* Many other fee statutes do not describe fees "as" costs, but instead as an item separate from costs. Typical formulations include "costs and a reasonable attorney's fee," "costs together with a reasonable attorney's fee," and "costs, expenses, and a reasonable attorney's fee." Some statutes simply authorize awards of fees without any reference to costs. Under the Court's "plain language" approach, none of these formulations "defin[e] 'costs' to include attorney's fees." *Ibid.* Thus where an action otherwise is governed by Rule 68, attorney's fees that are potentially awardable under these statutes are *not* subject to Rule 68 and instead

are to be evaluated solely under the reasonableness standard as summarized in *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983).

(C) *Statutes that may or may not refer to attorney's fees as part of the costs.* A number of statutes authorize the award of "costs and expenses, including attorney's fees." It is altogether uncertain how such statutes should be categorized under the Court's "plain language" approach to Rule 68. On the one hand, if the phrase "including attorney's fees" is read as modifying the word "costs" at least in part, attorney's fees that are potentially awardable under these statutes arguably are subject to Rule 68. On the other hand, if "including attorney's fees" is read as modifying only the word "expenses" (which seems to be the more plausible "plain meaning"), fees under these statutes are *not* subject to Rule 68 and instead are governed solely by the reasonableness standard as summarized in *Hensley* v. *Eckerhart*, *supra*.

The following is a summary of the statutes enacted by Congress authorizing courts to award attorney's fees, broken down into the three categories discussed above.[65] The Court has not explained why it is that either Congress or the drafters of the Federal Rules might have intended to create such disparate settlement incentives based on minor variations in the phraseology of attorney's fee statutes.

A. *Attorney's Fees Referred to as "Costs"*

1. Freedom of Information Act, 5 U. S. C. §§ 552(a)(4)(E) and (F).
2. Privacy Act of 1974, 5 U. S. C. §§ 552a(g)(2)(B), 552a(g)(4)(B).
3. Government in the Sunshine Act, 5 U. S. C. § 552b(i).

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[65] This list does not purport to be a complete enumeration of all statutes authorizing court-awarded attorney's fees. Moreover, I do not suggest that all of these statutes necessarily are governed by Rule 68's offer-of-judgment provisions.

1 Appendix to opinion of BRENNAN, J., dissenting

4. Commodity Exchange Act, 88 Stat. 1394, as amended, 7 U. S. C. §§ 18(d) and (e).
5. Packers and Stockyard Act of 1921, 42 Stat. 166, as amended, 7 U. S. C. § 210(f).
6. Perishable Agricultural Commodities Act of 1930, 46 Stat. 534, as amended, 7 U. S. C. § 499g(b).
7. Agricultural Fair Practices Act of 1967, 82 Stat. 95, 7 U. S. C. §§ 2305(a) and (c).
8. Home Owners' Loan Act of 1933, 48 Stat. 132, as amended, 12 U. S. C. § 1464(q)(3).
9. Bank Holding Company Act Amendments of 1970, 84 Stat. 1767, 12 U. S. C. § 1975.
10. Clayton Antitrust Act, 38 Stat. 731, as amended, 15 U. S. C. §§ 15(a) and (b).
11. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394, 1396, as amended, 15 U. S. C. §§ 15c(a)(2), 26.
12. Unfair Competition Act of 1916, 39 Stat. 798, 15 U. S. C. § 72.
13. Securities Act of 1933, 48 Stat. 82, as amended, 15 U. S. C. § 77k(e).
14. Trust Indenture Act of 1939, 53 Stat. 1171, 1176, 15 U. S. C. §§ 77*ooo*(e), 77www(a).
15. Securities Exchange Act of 1934, 48 Stat. 890, 898, as amended, 15 U. S. C. §§ 78i(e), 78r(a).
16. Jewelers Hall-Mark Act, 34 Stat. 262, as amended, 15 U. S. C. §§ 298(b)–(d).
17. Consumer Product Safety Act, 86 Stat. 1218, 1226, as amended, 15 U. S. C. §§ 2060(c) and (f), 2072(a), 2073.
18. Hobby Protection Act, 87 Stat. 686, 15 U. S. C. § 2102.
19. Export Trading Company Act of 1982, 96 Stat. 1243, 15 U. S. C. §§ 4016(b)(1) and (4).
20. National Cooperative Research Act of 1984, 98 Stat. 1817, 15 U. S. C. §§ 4304(a) and (b) (1982 ed., Supp. III).
21. National Historic Preservation Act Amendments of 1980, 94 Stat. 3002, 16 U. S. C. § 470w–4.

22. Endangered Species Act of 1973, 87 Stat. 897, as amended, 16 U. S. C. § 1540(g)(4).
23. Public Utility Regulatory Policies Act of 1978, 92 Stat. 3129, 16 U. S. C. §§ 2632(a) and (b).
24. Copyright Act of 1976, 90 Stat. 2586, 17 U. S. C. § 505.
25. Semiconductor Chip Protection Act of 1984, 98 Stat. 3353, 17 U. S. C. § 911(f) (1982 ed., Supp. III).
26. Racketeer Influenced and Corrupt Organizations Act, 18 U. S. C. § 1964(c).
27. Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. § 2520.
28. Jury System Improvement Act of 1978, 28 U. S. C. § 1875(d)(2).
29. Rehabilitation Act of 1973, 92 Stat. 2982, 29 U. S. C. § 794a(b).
30. Surface Mining Control and Reclamation Act of 1977, 91 Stat. 503, 30 U. S. C. § 1270(d).
31. Deep Seabed Hard Mineral Resources Act, 94 Stat. 573, 30 U. S. C. § 1427(c).
32. Federal Oil and Gas Royalty Management Act of 1982, 96 Stat. 2458, 30 U. S. C. § 1734(a)(4).
33. Federal Water Pollution Control Act, 86 Stat. 888, 33 U. S. C. § 1365(d).
34. Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1057, 33 U. S. C. § 1415(g)(4).
35. Deepwater Ports Act of 1974, 88 Stat. 2141, 33 U. S. C. § 1515(d).
36. Act to Prevent Pollution from Ships, 94 Stat. 2302, 33 U. S. C. § 1910(d).
37. Safe Drinking Water Act, 88 Stat. 1690–1691, as amended, 42 U. S. C. §§ 300j–8(d), 300j–9(2)(B)(i) and (ii).
38. Voting Rights Act of 1965, 79 Stat. 445, as amended, 42 U. S. C. § 1973*l*(e).
39. The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. § 1988.

40. Civil Rights of Institutionalized Persons Act, 94 Stat. 350–351, 42 U. S. C. §§ 1997a(b), 1997c(d).
41. Title II of the Civil Rights Act of 1964, 78 Stat. 244, 42 U. S. C. § 2000a–3(b).
42. Title III of the Civil Rights Act of 1964, 78 Stat. 246, 42 U. S. C. § 2000b–1.
43. Title VII of the Civil Rights Act of 1964, 78 Stat. 261, 42 U. S. C. § 2000e–5(k).
44. Privacy Protection Act of 1980, 94 Stat. 1880, 42 U. S. C. § 2000aa–6(f).
45. Noise Control Act of 1972, 86 Stat. 1244, 42 U. S. C. § 4911(d).
46. Comprehensive Older Americans Act Amendments of 1978, 92 Stat. 1555, 42 U. S. C. § 6104(e)(1).
47. Energy Policy and Conservation Act, 89 Stat. 930, 42 U. S. C. § 6305(d).
48. Resource Conservation and Recovery Act of 1976, 90 Stat. 2826, 42 U. S. C. § 6972(e).
49. Clean Air Act, 84 Stat. 1686, 1706–1707, 42 U. S. C. §§ 7413(b), 7604(d), 7607(f).
50. Clean Air Act Amendments of 1977, 91 Stat. 784, 42 U. S. C. § 7622(e)(2).
51. Powerplant and Industrial Fuel Use Act of 1978, 92 Stat. 3335, 42 U. S. C. § 8435(d).
52. Ocean Thermal Energy Conversion Act of 1980, 94 Stat. 990, 42 U. S. C. § 9124(d).
53. Outer Continental Shelf Lands Act Amendments of 1978, 92 Stat. 657, 43 U. S. C. § 1349(a)(5).
54. Railway Labor Act of 1926, 44 Stat. 578, as amended, 45 U. S. C. § 153(p).
55. Shipping Act of 1916, 39 Stat. 737, as amended, 46 U. S. C. § 829.
56. Merchant Marine Act of 1936, 49 Stat. 2015, as amended, 46 U. S. C. § 1227.
57. Shipping Act of 1984, 98 Stat. 3132, 46 U. S. C. App. § 1710(h)(2) (1982 ed., Supp. III).

58. Communications Act of 1934, 48 Stat. 1072, 1095, 47 U. S. C. §§ 206, 407.
59. Cable Communications Policy Act of 1984, 98 Stat. 2779, 47 U. S. C. §§ 553(c)(2), 605(d)(3)(B) (1982 ed., Supp. III).
60. Natural Gas Pipeline Safety Act, 90 Stat. 2076, as amended, 49 U. S. C. App. § 1686(e).
61. Hazardous Liquid Pipeline Safety Act of 1979, 93 Stat. 1015, 49 U. S. C. App. § 2014(e).
62. Interstate Commerce Act, 49 U. S. C. §§ 11705(d)(3), § 11710(b).
63. Foreign Intelligence Surveillance Act of 1978, 92 Stat. 1796, 50 U. S. C. § 1810(c).

B. *Attorney's Fees Not Referred to as "Costs"*

1. Privacy Act of 1974, 5 U. S. C. § 552a(g)(4)B.
2. Plant Variety Act, 84 Stat. 1556, 7 U. S. C. § 2565.
3. Bankruptcy Act of 1978, as amended, 11 U. S. C. §§ 303(i), 362(h), 363(n), 523(d).
4. Home Owners' Loan Act of 1933, 48 Stat. 132, as amended, 12 U. S. C. § 1464(d)(8)(A).
5. National Housing Act, 48 Stat. 1260, as amended, 12 U. S. C. § 1730(m)(3).
6. Federal Credit Union Act, 84 Stat. 1010, as amended, 12 U. S. C. § 1786(p).
7. Federal Deposit Insurance Act, 64 Stat. 879, as amended, 12 U. S. C. § 1818(n).
8. Real Estate Settlement Procedures Act of 1974, 88 Stat. 1728, as amended, 12 U. S. C. § 2607(d)(2)(b).
9. Right to Financial Privacy Act of 1978, 92 Stat. 3708, 3789, 12 U. S. C. §§ 3417(a)(4), 3418.
10. Securities Exchange Act of 1934, 48 Stat. 899, as amended, 15 U. S. C. § 78u(h)(8).
11. Trademark Act, 60 Stat. 439, as amended, 15 U. S. C. § 1117.

12. National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 724, 15 U. S. C. § 1400(b).
13. Truth-in-Lending Act, 82 Stat. 157, as amended, 15 U. S. C. § 1640(a).
14. Consumer Leasing Act, 90 Stat. 259, 15 U. S. C. § 1667b(a).
15. Consumer Credit Protection Act, 84 Stat. 1134, 15 U. S. C. §§ 1681n(3), 1681*o*(2).
16. Consumer Credit Protection Act, 88 Stat. 1524, 15 U. S. C. § 1691e(d).
17. Consumer Credit Protection Act, 91 Stat. 881, 15 U. S. C. § 1692k(a).
18. Electronic Fund Transfer Act, 92 Stat. 3737, 15 U. S. C. §§ 1693m(a) and (f).
19. Interstate Land Sales Full Disclosure Act, 82 Stat. 595, as amended, 15 U. S. C. § 1709(c).
20. Motor Vehicle Information and Cost Savings Act, 86 Stat. 955, 963, as amended, 15 U. S. C. §§ 1918(a), 1989(a)(2).
21. Toxic Substances Control Act, 90 Stat. 2039, 2041–2042, 15 U. S. C. §§ 2618(d), 2619(c)(2), 2020(b)(4)(C).
22. Petroleum Marketing Practices Act, 92 Stat. 331, 15 U. S. C. §§ 2805(d)(1) and (3).
23. Condominium and Cooperative Abuse Relief Act of 1980, 94 Stat. 1677, 1679, 15 U. S. C. §§ 3608(d), 3611(d).
24. Alaska National Interest Lands Conservation Act, 94 Stat. 2426, 16 U. S. C. § 3117(a).
25. Navajo and Hopi Indian Relocation Amendments Act of 1980, 94 Stat. 934, 25 U. S. C. § 640d–27(b).
26. Tax Reform Act of 1976, 90 Stat. 1665, 26 U. S. C. § 6110(i)(2).
27. Judicial Code, 28 U. S. C. § 1927.
28. Equal Access to Justice Act, 28 U. S. C. § 2412(b).
29. Norris-LaGuardia Act, 47 Stat. 71, 29 U. S. C. § 107.

30. Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U. S. C. § 216(b).
31. Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 524, 29 U. S. C. § 431(c).
32. Age Discrimination in Employment Act of 1967, 81 Stat. 604, as amended, 29 U. S. C. § 626(b).
33. Employee Retirement Income Security Act of 1974, 88 Stat. 891, as amended, 29 U. S. C. § 1132(g).
34. Multiple Mineral Development Act, 68 Stat. 710, 30 U. S. C. § 526(e).
35. State and Local Fiscal Assistance Act of 1972, 86 Stat. 919, as amended, 31 U. S. C. § 6721(c).
36. Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1438, as amended, 33 U. S. C. § 928(a).
37. Patent Infringement Act, 66 Stat. 813, 35 U. S. C. § 285.
38. Servicemen's Group Life Insurance Act, 72 Stat. 1165, 38 U. S. C. § 784(g).
39. Social Security Act, 49 Stat. 624, as amended, 42 U. S. C. § 406(b).
40. Atomic Energy Act of 1954, 68 Stat. 946, 42 U. S. C. § 2184.
41. Legal Services Corporation Act, 88 Stat. 381, as amended, 42 U. S. C. § 2996e(f).
42. Fair Housing Act of 1968, 82 Stat. 88, 42 U. S. C. § 3612(c).
43. Mobile Home Construction and Safety Standards Act, 88 Stat. 706, as amended, 42 U. S. C. § 5412(b).
44. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 94 Stat. 2792, 42 U. S. C. § 9612(c)(3).
45. Outer Continental Shelf Lands Act Amendments of 1978, 92 Stat. 658, 682, 43 U. S. C. §§ 1349(b)(2), 1818(c)(1)(C).
46. Alaska National Interest Lands Conservation Act, 94 Stat. 2430, 43 U. S. C. § 1631(c).

47. Act of Mar. 2, 1897, 29 Stat. 619, 48 U. S. C. § 1506.
48. Interstate Commerce Act, 49 U. S. C. § 11708(c).
49. Household Goods Transportation Act of 1980, 94 Stat. 2016, as amended, 49 U. S. C. §§ 11711(d) and (e).

C. *"Costs and Expenses, Including Attorney's Fees"*

1. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 88 Stat. 2189, 15 U. S. C. § 2310(d)(2).
2. Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1263, 29 U. S. C. § 1451(e).
3. Federal Mine Safety and Health Act of 1977, 91 Stat. 1303, 92 Stat. 183, 30 U. S. C. §§ 815(c)(3), 938(c).
4. Surface Mining Control and Reclamation Act of 1977, 91 Stat. 511, 520, 30 U. S. C. §§ 1275(e), 1293(c).
5. Uniform Relocation Assistance and Real Property Acquisition Policies Act, 84 Stat. 1906, 42 U. S. C. §§ 4654(a) and (c).
6. Nuclear Regulatory Commission Appropriations Authorization of 1978, 92 Stat. 2953, 42 U. S. C. § 5851(e)(2).
7. Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 122, as amended, 45 U. S. C. § 854(g).

UNITED STATES *v.* SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF SHEARER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-194. Argued February 25, 1985—Decided June 27, 1985

Respondent's decedent, her son who was an Army private, was off duty at Fort Bliss and away from the base when he was kidnaped and murdered by another serviceman, who was convicted of the murder in a New Mexico court and who had also been convicted by a German court of manslaughter in 1977 while assigned to an Army base in Germany. Respondent brought this action against the Government in Federal District Court under the Federal Tort Claims Act (Act), claiming that the Army's negligence caused her son's death. Respondent alleged that, although the Army knew that the other serviceman was dangerous, it "negligently and carelessly failed to exert a reasonably sufficient control over" him, "failed to warn other persons that he was at large, [and] negligently and carelessly failed to . . . remove [him] from active military duty." The District Court granted summary judgment for the Government, but the Court of Appeals reversed, concluding, *inter alia*, that *Feres* v. *United States*, 340 U. S. 135—which held that a soldier may not recover under the Act for injuries that "arise out of or are in the course of activity incident to service," *id.*, at 146—did not bar respondent's suit.

Held: Recovery under the Act is barred by the *Feres* doctrine, which is based, *inter alia*, on the special relationship of the soldier to his superiors, the effects of the maintenance of suits under the Act on discipline, and the extreme results that might obtain if such suits were allowed for negligent orders given or negligent acts committed in the course of military duty. The Court of Appeals erroneously placed great weight on the fact that respondent's son was off duty and away from the base when he was murdered; the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, and whether the suit might impair essential military discipline. Respondent's complaint strikes at the core of these concerns; her allegations go directly to the "management" of the military, calling into question basic choices about the discipline, supervision, and control of a serviceman. To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions. Nor is the *Feres* doctrine rendered inapplicable by respondent's focusing only

on this case with a claim of negligence, and by characterizing her claim as a challenge to a "straightforward personnel decision." By whatever name it is called, it is a decision of command. Pp. 57–59.

723 F. 2d 1102, reversed.

BURGER, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, and III, in which BRENNAN, WHITE, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, and an opinion with respect to Part II–A, in which WHITE, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 59. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 60. POWELL, J., took no part in the decision of the case.

Deputy Solicitor General Geller argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Acting Assistant Attorney General Willard*, *David A. Strauss*, *Anthony J. Steinmeyer*, and *Robert V. Zener*.

William T. Cannon argued the cause and filed a brief for respondent.

CHIEF JUSTICE BURGER delivered the opinion of the Court, except as to Part II–A.

We granted certiorari to decide whether the survivor of a serviceman, who was murdered by another serviceman, may recover from the Government under the Federal Tort Claims Act for negligently failing to prevent the murder.

I

Respondent is the mother and administratrix of Army Private Vernon Shearer. While Private Shearer was off duty at Fort Bliss and away from the base, he was kidnaped and murdered by another serviceman, Private Andrew Heard. A New Mexico court convicted Private Heard of Shearer's murder and sentenced him to a term of 15 to 55 years' imprisonment.

Respondent brought this action under the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b) and 2671 *et seq.*, claiming

that the Army's negligence caused Private Shearer's death. Respondent alleged that Private Heard, while assigned to an Army base in Germany in 1977, was convicted by a German court of manslaughter and sentenced to a 4-year prison term. Upon his discharge from that confinement in Germany, the Army transferred Private Heard to Fort Bliss. Respondent alleged that, although the Army knew that Private Heard was dangerous, it "negligently and carelessly failed to exert a reasonably sufficient control over" him and "failed to warn other persons that he was at large." App. 14.

The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the Government. The Court of Appeals reversed. 723 F. 2d 1102 (CA3 1983). The court held that *Feres* v. *United States*, 340 U. S. 135 (1950), did not bar respondent's suit because "[g]enerally an off-duty serviceman not on the military base and not engaged in military activity at the time of injury, can recover under FTCA." 723 F. 2d, at 1106. The court also held that respondent's suit was not precluded by the intentional tort exception to the Act, 28 U. S. C. § 2680(h). The Court of Appeals noted that respondent's complaint alleged negligence and reasoned that "if an assault and battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA." *Id.*, at 1107.[1]

We granted certiorari. 469 U. S. 929 (1984). We reverse.

II

A

The Federal Tort Claims Act's waiver of sovereign immunity does not apply to "[a]ny claim arising out of assault [or] battery," 28 U. S. C. § 2680(h), and it is clear that re-

[1] Judge Garth dissented on the ground that respondent's claim is barred by *Feres* and the intentional tort exception to the Act.

spondent's claim arises out of the battery committed by Private Heard. No semantical recasting of events can alter the fact that the battery was the immediate cause of Private Shearer's death and, consequently, the basis of respondent's claim.

Respondent cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee. Thus "the express words of the statute" bar respondent's claim against the Government. *United States* v. *Spelar*, 338 U. S. 217, 219 (1949).

The legislative history of § 2680(h), although sparse, is entirely consistent with our interpretation. There is no indication that Congress distinguished between "negligent supervision" claims and *respondeat superior* claims, with only the latter excluded under the Act. Instead it appears that Congress believed that § 2680(h) would bar claims arising out of a certain type of factual situation—deliberate attacks by Government employees. For example, Congress was advised by the Department of Justice that the exception would apply "where some agent of the Government gets in a fight with some fellow . . . [a]nd socks him." Tort Claims: Hearings on H. R. 5373 and H. R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 33 (1942).

It is clear that Congress passed the Tort Claims Act on the straightforward assurance that the United States would not be financially responsible for the assaults and batteries of its employees. See Tort Claims Against the United States: Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., 39 (1940). No one suggested that liability would attach if the Government negligently failed to supervise such an assailant.

This legislative understanding was reconfirmed in 1974 when Congress amended § 2680(h) to waive sovereign immunity for claims arising out of the intentional torts of law enforcement officers. See Pub. L. 93–253, § 2, 88 Stat. 50. The premise of the legislation was that unamended § 2680(h) "protect[ed] the Federal Government from liability when its agents commit[ted] intentional torts such as assault and battery." S. Rep. No. 93–588, p. 3 (1973). Once again, Congress did not hint that it thought the Government's liability for an assault and battery turned on the adequacy of supervision or warnings.[2]

The Court's interpretation of parallel exceptions in § 2680 also supports our decision. In *United States* v. *Neustadt*, 366 U. S. 696 (1961), the Court held that the exception in § 2680(h) for claims "arising out of . . . misrepresentation" covers cases in which negligence underlies the inaccurate representation. And in *Kosak* v. *United States*, 465 U. S. 848 (1984), we held that the exception for claims "arising in respect of . . . the detention of any goods or merchandise by any officer of customs" includes a claim for negligent handling. Because Congress viewed these exceptions in the same light as the exception at issue here, see, *e. g.*, H. R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945), it is inescapable that the phrase "arising out of assault [or] battery" is broad enough to encompass claims sounding in negligence.

Today's result is not inconsistent with the line of cases holding that the Government may be held liable for negligently failing to prevent the intentional torts of a nonemployee under its supervision. See, *e. g.*, *Panella* v. *United States*, 216 F. 2d 622 (CA2 1954) (Harlan, J.). In enacting the Federal Tort Claims Act, Congress' focus was

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[2] This is true even though Congress had reason to believe that "several incidents" of "abusive, illegal and unconstitutional 'no-knock' raids" by federal narcotics agents were the result of inadequate supervision. See S. Rep. No. 93–588, p. 2 (1973).

on the extent of the Government's liability for the actions of its *employees*. See generally *Panella*, *supra*, at 626. Thus, in referring to assaults and batteries in § 2680(h), Congress at least intended to exclude claims arising from such intentional torts committed by Government employees.

B

Our holding in *Feres* v. *United States*, 340 U. S. 135 (1950), was that a soldier may not recover under the Federal Tort Claims Act for injuries which "arise out of or are in the course of activity incident to service." *Id.*, at 146. Although the Court in *Feres* based its decision on several grounds,

> "[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.'" *United States* v. *Muniz*, 374 U. S. 150, 162 (1963), quoting *United States* v. *Brown*, 348 U. S. 110, 112 (1954).

The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases. Here, the Court of Appeals placed great weight on the fact that Private Shearer was off duty and away from the base when he was murdered. But the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, see *Stencel Aero Engineering Corp.* v. *United States*, 431 U. S. 666, 673 (1977), and whether the suit might impair essential military discipline, see *Chappell* v. *Wallace*, 462 U. S. 296, 300, 304 (1983).

Respondent's complaint strikes at the core of these concerns.[3] In particular, respondent alleges that Private Shearer's superiors in the Army "negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, . . . failed to warn other persons that he was at large, [and] negligently and carelessly failed to . . . remove Andrew Heard from active military duty." App. 14. This allegation goes directly to the "management" of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman.[4]

Respondent's case is therefore quite different from *Brooks* v. *United States*, 337 U. S. 49 (1949), where the Court allowed recovery under the Tort Claims Act for injuries caused by a negligent driver of a military truck. Unlike the negligence alleged in the operation of a vehicle, the claim here would require Army officers "to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp.* v. *United States*, *supra*, at 673. To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct. But as we noted in *Chappell* v. *Wallace*, such "'complex, subtle, and professional decisions as to the composition, training, . . . and control of a military force are essentially professional military judgments.'" 462 U. S., at 302, quoting *Gilligan* v. *Morgan*, 413 U. S. 1, 10 (1973).

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[3] It is immaterial that this suit was brought by a representative of the serviceman; indeed, *Feres* itself was brought by an executrix. *Feres* v. *United States* 340 U. S. 135, 136–137 (1950).

[4] Although no longer controlling, other factors mentioned in *Feres* are present here. It would be anomalous for the Government's duty to supervise servicemen to depend on the local law of the various states, see *id.*, at 143, 146; and the record shows that Private Shearer's dependents are entitled to statutory veterans' benefits. See *id.*, at 144–145.

Finally, respondent does not escape the *Feres* net by focusing only on this case with a claim of negligence, and by characterizing her claim as a challenge to a "straightforward personnel decision." Tr. of Oral Arg. 37. By whatever name it is called, it is a decision of command. The plaintiffs in *Feres* and *Stencel Aero Engineering* did not contest the wisdom of broad military policy; nevertheless, the Court held that their claims did not fall within the Tort Claims Act because they were the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. Similarly, respondent's attempt to hale Army officials into court to account for their supervision and discipline of Private Heard must fail.

III

Special Assistant to the Attorney General Holtzoff, testifying on behalf of the Attorney General, described the proposed Federal Tort Claims Act as "a radical innovation" and thus counseled Congress to "take it step by step." Tort Claims Against the United States: Hearings on H. R. 7236 before Subcommittee No. 1 of the House Committee on the Judiciary, 76th Cong., 3d Sess., 22 (1940). We hold that Congress has not undertaken to allow a serviceman or his representative to recover from the Government for negligently failing to prevent another serviceman's assault and battery. Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in part and concurring in the judgment.

I do not join Part II–A of THE CHIEF JUSTICE's opinion. I do, however, join Part II–B and therefore concur in the judgment.

JUSTICE MARSHALL, concurring in the judgment.

While I am not a firm supporter of *Feres* v. *United States*, 340 U. S. 135 (1950), I can support Part II–B of the Court's opinion and concur in the judgment.

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84–861. Argued April 23, 1985—Decided June 27, 1985

The Rules on Containers (Rules) require that some cargo containers owned or leased by marine shipping companies that otherwise would be loaded or unloaded within the local port area (defined as anywhere within a 50-mile radius of the port) instead must be loaded or unloaded by longshoremen at the pier. These Rules were collectively bargained for by respondent union after the advent of "containerization" had drastically reduced the amount of longshoremen's on-pier work involved in cargo handling. In this case, the National Labor Relations Board (Board) held that the Rules constituted unlawful secondary activity under §§ 8(b)(4)(B) and 8(e) of the National Labor Relations Act when applied to containers destined for "shortstopping" truckers (truckers who stop in the vicinity of a pier to load and unload cargo for reasons related to trucking requirements) and "traditional" warehousers (warehousers who perform loading and unloading of cargo at the warehouse for reasons unrelated to marine transportation). The Board reasoned that because the Rules, as so applied, sought to preserve longshoremen's work that had been "eliminated" by containerization, the Rules had "an illegal work acquisition objective." The Court of Appeals refused to enforce the Board's decision, holding that the Board had failed to make any factual finding that the Rules actually operated to deprive "shortstopping" truckers or "traditional" warehousers of any work, and that, as a matter of law, an agreement that preserves duplicative or technologically "eliminated" work does not constitute unlawful "work acquisition."

Held: The Board's partial invalidation of the Rules as applied in the contexts in question is inconsistent with *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612, and *NLRB* v. *Longshoremen*, 447 U. S. 490 *(ILA I)*. Pp. 73–84.

(a) *National Woodwork*, *supra*, concluded that §§ 8(b)(4)(B) and 8(e) were intended by Congress to "reach only secondary pressures," and that agreements negotiated with the objective of preserving work in the face of a threat to union members' jobs are lawful primary activity. These conclusions were reaffirmed in *NLRB* v. *Pipefitters*, 429 U. S. 507, and *ILA I*, *supra*. Pp. 74–78.

(b) By focusing on the effect that the Rules might have on "short-stopping" truckers and "traditional" warehousers, the Board contravened this Court's direction in *ILA I*, *supra*, at 507, n. 22, that such extra-unit effects, "no matter how severe," are "irrelevant" to the analysis. Given the Rules' primary objective to preserve longshoremen's work in the face of a threat to jobs, extra-unit effects of a work preservation agreement alone provide an insufficient basis for concluding that the agreement has an unlawful secondary objective. Pp. 78–79.

(c) The Board misconstrued this Court's cases in suggesting that "eliminated work" can never be the object of a work preservation agreement. "Elimination" of work in the sense that it is made unnecessary by innovation is not of itself a reason to condemn work preservation agreements under §§ 8(b)(4)(B) and 8(e); to the contrary, such elimination provides the very premise for such agreements. The relevant inquiry is whether a union's activity is primary or secondary, and no talismanic tests may substitute for analysis. When the objective of an agreement and its enforcement is so clearly one of work preservation as is the one involved here, the lawfulness of the agreement under §§ 8(b)(4)(B) and 8(e) is secure, absent some other evidence of secondary purpose. Pp. 80–82.

(c) The Rules are a lawful work preservation agreement, and nothing in the record of this case suggests a conclusion that their enforcement has had a secondary, rather than a primary, objective. P. 84.

734 F. 2d 966, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined, *post*, p. 84.

Norton J. Come argued the cause for petitioner. With him on the briefs were *Solicitor General Lee*, *Deputy Solicitor General Fried*, *David A. Strauss*, and *Linda Sher*. *J. Alan Lips* argued the cause for the American Trucking Associations, Inc., et al., respondents under this Court's Rule 19.6 in support of petitioner. With him on the briefs were *Mark E. Lutz* and *Kenneth E. Siegel*. Briefs in support of petitioner were filed by *William L. Auten* for Houff Transfer, Inc., *William H. Towle* for the American Warehousemen's Association, and *David Previant*, *Robert M. Baptiste*, and *Roland P. Wilder, Jr.*, for the International Brotherhood

of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, all respondents under this Court's Rule 19.6.

Donato Caruso argued the cause for respondent New York Shipping Association, Inc. *Ernest L. Mathews, Jr.*, argued the cause for respondent International Longshoremen's Association, AFL–CIO. With them on the brief were *C. P. Lambos*, *Thomas W. Gleason*, and *Francis A. Scanlan.**

JUSTICE BRENNAN delivered the opinion of the Court.

The Rules on Containers are collectively bargained-for guidelines requiring marine shipping companies to allow some of the large cargo containers that they own or lease to be loaded or unloaded by longshoremen at the pier. In *NLRB* v. *Longshoremen*, 447 U. S. 490 (1980) *(ILA I)*, we reviewed the National Labor Relations Board's conclusion that the Rules and their enforcement constituted unlawful secondary activity under §§ 8(b)(4)(B) and 8(e) of the National Labor Relations Act, as amended, 29 U. S. C. §§ 158(b)(4)(B) and 158(e). Respondent union, the International Longshoremen's Association (ILA), defended the Rules as lawful under the "work preservation" doctrine of *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612 (1967). We ruled, however, that the Board's preliminary definition of the work in dispute had been legally erroneous, because it focused on the off-pier work of nonlongshoremen rather than on the work of longshoremen sought to be preserved. 447 U. S., at 507–508. We therefore affirmed the Court of Appeals' remand of the Rules to the Board, directing it to "focus on the work of the bargaining unit employees, not

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**Dixie L. Atwater* and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

George Kaufmann, *David Silberman*, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

Stephen E. Tallent and *William F. Highberger* filed a brief for Delta Steamship Lines, Inc., as *amicus curiae*.

on the work of other employees who may be doing the same or similar work." *Id.*, at 507. The Board then sustained the Rules, but held that their enforcement against "short-stopping" truckers and "traditional" warehousers is unlawful. 266 N. L. R. B. 230 (1983). The question now presented is whether the Board's partial invalidation of the Rules as applied in these two contexts is consistent with *ILA I*.

I

At issue is the response of unionized dockworkers to a technological innovation known as "containerization." Traditionally, longshoremen employed by steamship or stevedoring companies loaded and unloaded cargo into and out of oceangoing vessels at the pier. Cargo arriving at the pier by truck was "transferred piece by piece from the truck's tailgate to the ship by longshoremen . . . . The longshoremen checked the cargo, sorted it, placed it on pallets and moved it by forklift to the side of the ship, and lifted it by means of a sling or hook into the ship's hold. The process was reversed for cargo taken off incoming ships." 447 U. S., at 495. As we explained in some detail in *ILA I*, the advent of containerization some 25 years ago profoundly transformed this traditional pattern, by reducing the cost of ocean cargo transport and "largely eliminat[ing] the need for cargo handling at intermediate stages." *Id.*, at 509.[1]

[1] Containers are large metal boxes designed to fit without adjustment into the holds of special ships and onto the chassis of special trucks and railroad cars. "Because cargo does not have to be handled and repacked as it moves from the warehouse by truck to dock, into the vessel, then from the vessel to the dock and by truck or rail to its destination, the costs of handling are greatly reduced. Expenses of separate export packaging, storage, losses from pilferage and breakage, and costs of insurance and processing cargo documents may also be decreased. Perhaps most significantly, a container ship can be loaded or unloaded in a fraction of the time required for a conventional ship. As a result, the unprofitable in-port time of each ship is reduced, and a smaller number of ships are needed to carry a given volume of cargo." *NLRB* v. *Longshoremen*, 447 U. S. 490, 494–495 (1980).

It is thus unsurprising that "the amount of on-pier work involved in cargo handling has been drastically reduced" and that containerization has been since its inception a "hotly disputed topic of collective bargaining" between the ILA and the marine shipping companies. *Id.*, at 495–496. The Rules are the evolutionary product of the ILA's bargaining efforts that began with the introduction of the first oceangoing container ship in the Port of New York in 1957.[2]

The Rules do not require that *all* containers be loaded or unloaded by longshoremen at the pier. Instead, they apply only to containers that would otherwise be loaded or unloaded within the local port area, defined for convenience as

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[2]The Administrative Law Judge (ALJ) in this case characterized the ILA's position regarding containers as "one of resistence *[sic]*" from the outset. 266 N. L. R. B. 230, 244 (1983). The 1959 agreement between the ILA and the New York Shipping Association, a multiemployer bargaining group for marine shipping companies in New York, reserved for longshoremen "[a]ny work performed in connection with the loading and discharging of containers . . . which is performed in the Port." *Ibid.* Discontent continued, however, over increasing off-pier use of containers. In 1969, after the lengthiest longshoremen's strike in the history of the Port of New York, a set of Rules substantially similar to the current Rules was negotiated. The Rules were recognized as a compromise, reserving for the ILA only about 20% of the total containerized cargo handled in New York. Nevertheless, the next five years were marked by work slowdowns and stoppages related to containerization, and the Rules were amended several times to increase their enforceability.

The text of the current Rules is substantively identical to the Rules printed as an Appendix to *ILA I.* 447 U. S., at 513–522. These Rules have been negotiated between the ILA and the Council of North Atlantic Shipping Associations, a multiemployer bargaining group encompassing the marine shipping companies in 36 major ports on the Atlantic and Gulf coasts. Longshoremen on the west coast are represented by a different union, the International Longshoremen and Warehousemen's Union. Although containerization has been a controversial collective-bargaining topic on the west coast as well, see Ross, Waterfront Lab. Response to Technological Change: A Tale of Two Unions, 21 Labor L. J. 397 (1970), only the ILA and the Atlantic and Gulf coast shippers are before the Court in this case.

anywhere within a 50-mile radius of the port. Rule 1(a).[3] Containers directly coming from or going to points beyond the 50-mile radius are not affected by the Rules. Rule 2. Even within the 50-mile area, containers that go directly to the owner of the cargo or to "bona fide" warehouses are exempted from the Rules. Rules 1(a)(2) and (3), 2(B)(4).[4] To ensure compliance, a fine of $1,000 is levied against a marine shipping company for each of its containers that it allows to be handled in violation of the Rules. Rule 7(c). As we noted in *ILA I:* "The practical effect of the Rules is that some 80% of containers pass over the piers intact. The remaining 20% are [loaded and unloaded] by longshoremen, regardless of whether that work duplicates work done by non-ILA employees off-pier." 447 U. S., at 499.

Although the marine shipping companies and longshoremen have accepted the various compromises that the Rules represent, three groups of non-ILA employers are unhappy

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[3] The ALJ found that the 50-mile rule developed from the use of the description "50 miles from Columbus Circle" to resolve early container-related grievances in New York. 266 N. L. R. B., at 245, n. 24. The Board approved the 50-mile rule as "a rational attempt to claim only that work actually performed in the general area surrounding the port." *Id.*, at 235.

[4] A warehouse is deemed "bona fide" if the container is to remain in storage at the warehouse for 30 days or more. Rule 2(B)(4). The ALJ found that this 30-day rule, like the 50-mile rule, represents a negotiated attempt to preserve traditional work patterns; it distinguishes traditional, pre-containerization warehouse functions from "warehouses . . . being used as 'drop points' for [container unloading] and reloading immediately onto trucks." 266 N. L. R. B., at 257. As the Board found, prior to containerization some short-term cargo storage work was performed by longshoremen at marine terminal warehouses, and containerization has "diverted" some of this traditional longshore work to off-pier warehouses. *Id.*, at 236. The 30-day rule was therefore approved as "a rational attempt to distinguish between short-term storage at a marine terminal warehouse and long-term storage at an inland public warehouse." *Ibid.*

The Rules also do not apply to "container loads of mail, household effects of a person who is relocating his place of residence, with no other type of cargo in the container, or personal effects of military personnel." Rules 2(A)(4) and (B)(4).

with the Rules. Freight consolidators, truckers, and warehousers all also load and unload containers. Freight consolidators are in the business of arranging for small loads of cargo to be delivered to their off-pier facilities, where consolidator employees combine the cargo with cargo from other parties to pack full containers, which are then delivered to the pier. Consolidators also receive from incoming vessels containers packed with several parties' cargo, which they unload and disperse to the respective owners.

Unlike consolidators, many of whose businesses have been founded on containerization, some truckers and warehousers have always performed some off-pier cargo handling work. For example, prior to containerization, some interstate truckers would pick up cargo at the pier, drive a short distance to a central facility, and then unload and reload the cargo to meet weight, safety, or delivery requirements. Such unloading and reloading near the pier still sometimes occurs, even if the cargo is picked up in containers. The trucking practice of stopping in the vicinity of the pier to unload and reload cargo for reasons related to trucking requirements is known as "shortstopping." Similarly, some warehousers have always performed some loading and unloading of cargo stored at the warehouse for reasons unrelated to marine transportation; such cargo handling is still sometimes necessary even though cargo is shipped in containers.[5]

All these facts were before the Court in *ILA I*. We did not find that any of them required invalidation of the Rules. Instead, because we found that the Board had erred as a matter of law in defining the "work" in controversy, we remanded to the Board for further proceedings. 447 U. S., at

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[5] The Board accepted the ALJ's findings that such "traditional" warehouse cargo handling work is performed in connection with, for example, "the ongoing storage of a manufacturer's goods for distribution on short notice to customers based on future orders and the ongoing storage of a company's purchased inventory for distribution on short notice to its foreign facilities as demand required." 266 N. L. R. B., at 236.

512–513. Nine cases involving charges of unfair labor practices filed by consolidators, truckers, or warehousers against the ILA were then consolidated by the Board and sent to an Administrative Law Judge (ALJ) for factfinding and disposition.[6] The charging parties claimed generally that the Rules constitute an unlawful agreement in violation of § 8(e),[7] and that enforcement of the Rules, which has resulted in marine transport companies not dealing with certain off-pier

[6] Two cases were vacated and remanded in *ILA I*. *International Longshoremen's Assn. (Dolphin Forwarding)*, 236 N. L. R. B. 525 (1978) (consolidators), and *International Longshoremen's Assn. (Associated Transport)*, 231 N. L. R. B. 351 (1977) (truckers), enf. denied, 613 F. 2d 890 (1979), vacated and remanded, 447 U. S. 490 (1980). Three cases were remanded by Courts of Appeals in light of *ILA I*. *International Longshoremen's Assn. (Consolidated Express)*, 221 N. L. R. B. 956 (1975) (consolidators), enf'd, 537 F. 2d 706 (CA2 1976), cert. denied, 429 U. S. 1041, same case, 602 F. 2d 494 (CA3 1979), vacated and remanded, 448 U. S. 902 (1980), remanded, 641 F. 2d 90 (CA3 1981); *International Longshoremen's Assn. (Beck Arabia)*, 245 N. L. R. B. 1325 (1979) (remanded by CA4) (warehousers); *International Longshoremen's Assn. (Puerto Rico Marine Management)*, 245 N. L. R. B. 1320 (1979) (remanded by CA5) (consolidators). The Board itself decided to reconsider one case, *International Longshoremen's Assn. (Terminal Corp.)*, 250 N. L. R. B. 8 (1980) (warehousers), and to add two other pending complaints, *International Longshoremen's Assn. (Hill Creek Farms)*, Nos. 4–CC–1133 and 4–CE–55 (warehousers), and *International Longshoremen's Assn. (Custom Brokers)*, No. 12–CE–30 (consolidators). The ninth case was added by the Board when its General Counsel subsequently issued a complaint. *International Longshoremen's Assn. (American Trucking)*, Nos. 22–CC–806, 807, 808, 809, and 810 and 22–CE–44, 45, 46, 47, and 48 (truckers). See *American Trucking Assns., Inc.* v. *NLRB*, 734 F. 2d 966, 975, n. 6 (1984); 266 N. L. R. B., at 232.

[7] "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible *[sic]* and void . . . ." 29 U. S. C. § 158(e).

employers, constitutes secondary boycotting illegal under § 8(b)(4)(B).[8]

In a detailed opinion, the ALJ sustained the Rules as a valid work preservation agreement. He found that the "historic jurisdiction" of longshoremen "includes all work in connection with the loading and unloading of cargo on ships, . . . including such related intermediate steps as receipt, storage, sorting, checking, palletizing, cargo repair, carpentry, maintenance and delivery." 266 N. L. R. B., at 247. He rejected the argument that containerization has so changed the character of the cargo transportation industry that this work has simply disappeared.[9] Noting that the Rules are

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[8] "It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce where in either case an object thereof is—

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided:* that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . ." 29 U. S. C. § 158(b)(4)(B).

Some of the unfair labor charges in these cases were filed due to cessations of business with off-pier employers by marine shipping companies after the companies were fined by the ILA for allowing "shortstoppers" and warehousers to handle containers in violation of the Rules. See *ILA I*, 447 U. S., at 500–502. Others were filed prior to the Rules taking effect in various ports. See, *e. g.*, 266 N. L. R. B., at 267–268. Thus the charges are based on facts somewhat attenuated from a direct application of the Rules themselves. The record is silent regarding whether any off-pier employers have actually "lost" work when longshoremen load or unload containers in compliance with the Rules.

[9] In *ILA I* we noted that the charging parties argued that "containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshoremen and employees of motor carriers has been completely eliminated." 447 U. S., at 510–511. We remanded the issue to the Board without commenting on the merits because

"narrowly tailored" to preserve only the work of loading and unloading containers, and that "[n]o other work is sought," *id.*, at 251, the ALJ also found that "the Rules merely restore to the unit work traditionally performed by the ILA." *Id.*, at 252. With regard to the alleged secondary nature of the Rules, the ALJ found that the Rules have a clear work-preserving objective and that no secondary motivation was shown: "On this record, there can be little question that . . . the Rules represented a negotiated response to accommodate the . . . inroads on ILA work jurisdiction" caused by containerization, and "the evidence fails to disclose any significant ILA interest in the labor relations of the [off-pier] employers boycotted by the Rules." *Id.*, at 248–249.[10]

The ALJ did not end his inquiry there, however. He concluded that despite the work preservation objective of the Rules, they might still be invalid if they had the effect of reserving for longshoremen cargo handling work that had been done by nonlongshore labor prior to containerization and thus was not "created" by containerization. *Id.*, at 252. The ALJ reasoned that "to the extent that the Rules seek to compensate longshoremen for losses at the expense of inland employees whose jobs did not derive from containerization, a

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it was "not appropriate for initial consideration by reviewing courts." *Id.*, at 511. On remand, the ALJ found that someone must still move cargo into and out of containers, and that "[t]here is no *inseparable* integration of these tasks with other labor functions or technology." 266 N. L. R. B., at 251 (emphasis in original).

[10] The ALJ also found that (1) the ILA has not "abandoned" its claim to container work, *id.*, at 260; (2) the marine shipping companies have the "right to control" the work in question because they own or lease the containers themselves, *id.*, at 261; and (3) the shipping companies' right to control the containers they own was not affected by a ruling by the Federal Maritime Commission (which has since been vacated by the Court of Appeals for the District of Columbia Circuit, *Council of North Atlantic Shipping Assns.* v. *FMC*, 223 U. S. App. D. C. 323, 690 F. 2d 1060 (1982)). 266 N. L. R. B., at 266–267. These findings were approved by the Board and the Court of Appeals as supported by substantial evidence, and are not at issue here.

proscribed 'work acquisition' objective would attach." *Ibid.* He then found that, although the "skills utilized . . . are indistinct from those of deep sea longshoremen," cargo handling work done by shortstoppers and "traditional" warehousers is work "assumed for a different purpose" than longshore cargo handling and "preexisted" containerization. *Id.*, at 256. He declared that the Rules therefore took on an impermissible secondary character when applied in those two contexts, and sustained unfair labor charges in three cases.[11]

The Board adopted the ALJ's findings and conclusions, stating that "the ILA had an overall work preservation objective in negotiating the Rules," and that "the work of loading and unloading containers claimed by the Rules is functionally related to the traditional loading and unloading work of the longshoremen." *Id.*, at 236, 237. The Board therefore held the Rules lawful as a general matter. It also agreed with the ALJ's partial invalidation "as applied," however, after modifying the ALJ's views in two respects.

First, the Board provided a definition of "the work in dispute," because the ALJ had not done so explicitly. *Id.*, at 236. Second, the Board rejected the ALJ's "findings that an illegal work acquisition objective is revealed in the Rules,"

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[11] *Associated Transport* ("shortstopping"); *Terminal Corp.* (warehousing); *Beck Arabia* (warehousing). 266 N. L. R. B., at 268, 269–270. Unfair labor charges also were sustained in *Custom Brokers*, but on a finding that the Rules had been employed in an unlawful attempt to organize two nonunion off-pier employers. 266 N. L. R. B., at 270–271. This finding was not challenged on appeal, 734 F. 2d, at 976, n. 7, and the *Customs Brokers* violations are not before us.

With respect to freight consolidators, the ALJ found that their container loading and unloading are performed "pursuant to a reallocation of work from the piers to off[-pier] facilities created virtually in its entirety by the development of containerization." 266 N. L. R. B., at 254. The ALJ consequently declared the Rules entirely valid as applied to preserve container work destined for consolidators. *Ibid.* The consolidators' charges were dismissed, as were the charges of one warehouser, Hill Creek Farms, found not to be engaged in "traditional" warehousing. *Id.*, at 268–269.

because his analysis "appear[ed] to conflict" with the direction in *ILA I* to focus on the work of longshoremen, not off-pier laborers. 266 N. L. R. B., at 236–237.

> "By focusing on the economic character of the trucking and warehousing industry and on the work historically performed by trucking and warehousing employees, the [ALJ's] . . . findings give undue emphasis to the work historically performed by trucking and warehousing employees and to the fact that this work was not created by containerization." *Ibid.*

Nevertheless, the Board held the Rules unlawful "as applied to 'shortstopping' and 'traditional' warehousing practices." *Id.*, at 236. The Board reasoned that some cargo loading and unloading work required to be performed by longshoremen under the Rules would unnecessarily duplicate the similar work done by "shortstopping" truckers and "traditional" warehousers. Because cargo in containers can now be moved directly to and from warehouses and trucking terminals without loading or unloading at the pier, the necessity for such longshore labor has been removed, while "traditional" warehousers and "shortstopping" truckers must still do some container loading and unloading at their facilities. Thus, the Board concluded, the loading and unloading work of the longshoremen "no longer exists as a step in the cargo handling process" and "essentially was eliminated" in these two contexts. *Id.*, at 237. Because the Rules seek to preserve this "eliminated" work, the Board concluded that they have "an illegal work acquisition objective" as applied. *Ibid.*

The Court of Appeals for the Fourth Circuit affirmed the Board's general validation of the Rules, concluding that the Board's crucial dual findings—that the shipping companies have the "right to control" container work, and that the Rules had a bona fide work preservation objective—were supported by substantial evidence. *American Trucking Assns., Inc.* v. *NLRB*, 734 F. 2d 966, 977–978 (1984). For

two reasons, however, the Court of Appeals refused to enforce the Board's decision that the Rules constitute unlawful secondary activity when applied to containers destined for "shortstopping" truckers and "traditional" warehousers.

First, in concluding that a partial objective of the Rules is "work acquisition," the Board had failed to make any factual finding that the Rules actually operate to deprive "shortstopping" truckers or "traditional" warehousers of any work. *Id.*, at 979. Second, the Court of Appeals concluded that, as a matter of law, an agreement that preserves duplicative or technologically "eliminated" work simply does not constitute "work acquisition." *National Woodwork* had approved as lawful primary activity a collective-bargaining agreement whose objective was "protection of union members from a diminution of work flowing from changes in technology." 386 U. S., at 648 (Harlan, J., concurring). The ALJ and the Board both had found that the same work-preserving purpose underlies the Rules on Containers. The Rules do not "in any way prevent the identical off-pier work," and although such work may be economically inefficient, "it is not our function as a court of review to weigh the economic cost of the Rules." 734 F. 2d, at 979. The Court of Appeals therefore concluded that "the Rules are lawful in their entirety and may be enforced." *Id.*, at 980.

Although a number of the charging parties sought review of the Fourth Circuit's decision, we granted only the Board's petition for certiorari, 469 U. S. 1188 (1985), thereby limiting our inquiry to the alleged unlawfulness of the Rules with regard to "shortstopping" truckers and "traditional" warehousers.

II

A

We have labored in the past to determine Congress' will as expressed in §§ 8(b)(4)(B) and 8(e)—this case requires no new development. In light of the Board's factual findings,

we believe the Court of Appeals' conclusion that the Rules do not violate these provisions, flows as a matter of course from *National Woodwork* and *ILA I*.[12]

In *National Woodwork*, after reviewing in detail the relevant legislative and judicial history, we concluded that "Congress meant that both § 8(e) and § 8(b)(4)(B) reach only secondary pressures." 386 U. S., at 638; accord, *Houston Contractors Assn.* v. *NLRB*, 386 U. S. 664, 668 (1967).[13] In this regard, the prohibitory scope of § 8(e) was found to be no broader than that of § 8(b)(4)(B). 386 U. S., at 635, 638. The purpose of § 8(e) had been to close a "loophole" in the labor laws that allowed unions to employ "hot cargo" agree-

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[12] The dissent apparently agrees with this assessment of our precedents, as its criticisms are directed largely at the rationales of *National Woodwork* and *ILA I*. See *post*, at 88–90. The rationale of our third major precedent in this area, *NLRB* v. *Pipefitters*, 429 U. S. 507 (1977), is not directly implicated in this case. *Pipefitters* held that activity taken to enforce a valid work preservation agreement will violate § 8(b)(4)(B) if the primary employer "does not have control over the assignment of the work sought by the union." *Id.*, at 510–511. In this case, the ALJ, Board, and Court of Appeals have unanimously concluded that the longshoremen's employers, marine shipping companies, have the "right to control" container loading and unloading work by virtue of their ownership or leasing control of the containers. See 734 F. 2d, at 978; 266 N. L. R. B., at 234, 260–267. Thus the *Pipefitters* test is satisfied here.

[13] Our review in *National Woodwork* extended back to § 20 of the Clayton Act of 1914, 38 Stat. 738, and the decisions in *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1921), and *Bedford Cut Stone Co.* v. *Stone Cutters*, 274 U. S. 37 (1927), which had held that § 20 immunized from the antitrust laws only those union activities "directed against an employer by his own employees." 386 U. S., at 621. We determined that Congress' intent in enacting the Taft-Hartley Act in 1947, 61 Stat. 136, and the Landrum-Griffin Amendments in 1959, 73 Stat. 519, which contained § 8(b)(4)(B) and § 8(e), respectively, had been to maintain this early distinction between primary and secondary union activity. 386 U. S., at 620–638. Today's dissent cites no new legislative history or other evidence to the contrary. See *post*, at 88; see also *post*, at 90–91 (§ 8(e) cannot be read literally, "because many labor-management 'agreements' will entail some secondary effects").

ments to pressure neutral employers not to handle nonunion goods. *Id.*, at 634–637; see *Carpenters* v. *NLRB*, 357 U. S. 93 (1958) *(Sand Door)*. However, we concluded, "Congress in enacting § 8(e) had no thought of prohibiting agreements directed to work preservation." 386 U. S., at 640.[14] Such agreements "are not used as a sword" to achieve secondary objectives, but as "a shield carried solely to preserve the members' jobs." *Id.*, at 630. Because the labor laws do not prohibit bona fide primary activity, we stated that the central inquiry for evaluating claims of work preservation is

> "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the primary employer's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis à vis* his own employees." *Id.*, at 644–645.

We expressly noted that a different case might be presented if a union engaged in activity "to reach out to monopolize jobs

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[14] Specifically at issue in *National Woodwork* was an agreement between a general contractor and its carpenters' union that union workers would not handle prefabricated doors. Carpenters had traditionally cut and installed blank doors at the jobsite, and the will-not-handle clause had been bargained for with the objective of preserving that work in the face of more efficient off-site technology. The record in *National Woodwork* indicated that it took a machine eight minutes to finish a door with on-site installation requiring only a few more minutes, while a carpenter at the jobsite would take over an hour to perform the same work. Brief for Petitioners in *National Woodwork Manufacturers Assn.* v. *NLRB*, O. T. 1966, No. 110, p. 5, n. 4. Unfair labor charges were filed by suppliers of the prefabricated doors, who claimed that the will-not-handle agreement was unlawfully secondary because it caused the contractor to cancel his business with the suppliers. We upheld the agreement and its enforcement, however, as lawful primary activity engaged in to preserve the carpenters' work. 386 U. S., at 645–646.

or acquire new job tasks *when their own jobs are not threatened . . . .*" *Id.*, at 630–631 (emphasis added).[15]

We reaffirmed the *National Woodwork* analysis in *ILA I*, and noted that "a lawful work preservation agreement must pass two tests": the objective of the agreement must be preservation of work for members of the union rather than some secondary goal, and the "right of control" test of *NLRB* v. *Pipefitters*, 429 U. S. 507 (1977), must be satisfied. 447 U. S., at 504.[16] We ruled, however, that the Board had

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[15] On this basis (the absence of a threat to union members' jobs) we distinguished boycotts of the type described in *Allen Bradley Co.* v. *Electrical Workers*, 325 U. S. 797 (1945), which the congressional sponsors of § 8(b)(4)(B) had sought to prohibit. In *Allen Bradley*, unionized employees of New York City electrical contractors had agreed with their local employers to boycott electrical equipment manufactured outside the city, in an effort "to secure benefits" for unionized employees of a *different* group of employers, the local electrical equipment manufacturers. 386 U. S., at 628–629; see 325 U. S., at 799–800. The union's agreement in *Allen Bradley* "was not in pursuance of any objective relating to pressuring their employers in the matter of *their* wages, hours, and working conditions; there was no work preservation or other primary objective" involved. 386 U. S., at 629 (emphasis in original). In this sense, the activity was purely acquisitive, indicating an unlawful secondary objective. Cf. *Pipefitters*, *supra*, at 528–530, n. 16 (condemning union attempts "not to preserve, but to aggrandize" its position); see Lesnick, Job Security and Secondary Boycotts: the Reach of NLRA §§ 8(b)(4) and 8(e), 113 U. Pa. L. Rev. 1000, 1017–1018 (1965).

[16] *Pipefitters* also reaffirmed the basic premises of *National Woodwork*, noting that so long as the "right to control" test is satisfied, it will not normally violate § 8(b)(4)(B) to engage in activity against one's own employer "for the purpose of preserving work traditionally performed by union members even though in order to comply with the union's demand the employer would have to cease doing business with another employer." 429 U. S., at 510. See n. 12, *supra*. *Pipefitters* involved a refusal by union steamfitters to install equipment containing factory-installed piping specified by the general contractor, based on the unit's agreement with its employer, a subcontractor on the job, not to handle such equipment. Because the subcontractor did not have the right to control equipment specifications for the job, the union's refusal was found to violate § 8(b)(4)(B). 429 U. S., at 511–513, 528–531.

erred as an initial matter by defining the "work in dispute" as "off-pier" container loading and unloading. *Id.*, at 506. Because technological innovation may significantly change the character of an industry, work preservation agreements negotiated to address such change "typically come into being when employees' traditional work is displaced." *Id.*, at 505. Consequently, the place where work is to be done often lies at the heart of the controversy, and is seldom relevant to the definition of the work itself. See *id.*, at 506–507.[17] The Board's focus on the container work performed off-pier by nonlongshoremen was erroneous because it ignored the question whether "the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns," *id.*, at 510, n. 24, and "foreclosed—by definition—any possibility that the longshoremen could negotiate an agreement to permit them to continue to play any part in the loading or unloading of containerized cargo." *Id.*, at 508.

ILA I concluded, however, that collective-bargaining agreements designed to "accommodate change" while still preserving some type of work for union members may nevertheless be lawful primary agreements; the work preservation doctrine does not require that unions block progress by refusing to permit any use at all of new technology in order to avoid the prohibitions of §§ 8(b)(4)(B) and 8(e). *Id.*, at 506. The inquiry is whether "the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere," *id.*, at 510, and the analytical focus must be "on the work of the bargaining unit employees, not on the work of

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[17] Thus the definition of the work in dispute under the Rules on Containers used by the Board on remand was simply "the work of loading and unloading containers." 266 N. L. R. B., at 237. Although the Board also stated a precise description of the work claimed by the Rules—"the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective bargaining relationship with the ILA," *id.*, at 236—the less complex definition more accurately describes the *work* in controversy as opposed to the precise means used to secure it in the collective-bargaining agreement at issue.

other employees . . . doing the same or similar work." *Id.*, at 507. "The effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant . . . so long as the union had no forbidden secondary purpose." *Id.*, at 507, n. 22.[18]

Because the Board's analysis had proceeded from an erroneous premise, we remanded. We directed the Board to examine "how the contracting parties sought to preserve . . . work, to the extent possible, in the face of" containerization, and "to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members." *Id.*, at 509. If, on remand, the Rules were found to be a bona fide attempt to preserve longshore work, rather than an effort "'tactically calculated to satisfy union objectives elsewhere,'" then the Rules would be valid. *Id.*, at 511, quoting *National Woodwork*, 386 U. S., at 644. "[T]he question is not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissible effort to preserve jobs." 447 U. S., at 511.

B

We accept the Board's factual findings as supported by substantial evidence, *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), and are mindful of the rule that the Board's construction of the Act is due our deference. See, *e. g.*, *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 500–501 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963). We are in agreement with the Board's basic statutory conclusions: §§ 8(b)(4)(B) and 8(e) prohibit secondary, but not

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[18] Cf. *NLRB* v. *Retail Store Employees*, 447 U. S. 607, 614 (1980) ("As long as secondary picketing only discourages consumption of a struck product, incidental injury to the neutral is a natural consequence of an effective primary boycott"); *NLRB* v. *Operating Engineers*, 400 U. S. 297, 303–304 (1971) ("primary activity is protected even though it may seriously affect neutral third parties" because "[s]ome disruption of business relationships is the necessary consequence of the purest form of primary activity").

primary, union activity, and bona fide work preservation agreements and their enforcement may constitute protected primary goals. Now that the Board has fully developed the factual record regarding the Rules, the only question presented is whether, as a matter of law, the Board applied the "work preservation" doctrine consistently with our prior cases.

In our view, the Board committed two fundamental errors. First, by focusing on the effect that the Rules may have on "shortstopping" truckers and "traditional" warehousers, the Board contravened our direction that such extra-unit effects, "no matter how severe," are "irrelevant" to the analysis. 447 U. S., at 507, n. 22. "So long as the union had no forbidden secondary purpose" to disrupt the business relations of a neutral employer, *ibid.*, such effects are "incidental to primary activity." *Pipefitters*, 429 U. S., at 526. Here the ALJ, Board, and Court of Appeals all have agreed that the Rules were motivated entirely by the longshoremen's understandable desire to preserve jobs against "the steadily dwindling volume" of cargo work at the pier. 734 F. 2d, at 978. Given this clear primary objective to preserve work in the face of a threat to jobs, extra-unit effects of a work preservation agreement alone provide an insufficient basis for concluding that the agreement has an unlawful secondary objective. Absent some additional showing of an attempt "to reach out to monopolize jobs," *National Woodwork*, *supra*, at 630, that is, proof of an attempt "not to preserve, but to aggrandize," *Pipefitters*, *supra*, at 528–530, n. 16, such an agreement is lawful.[19]

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[19] *Amicus* AFL–CIO suggests that any distinction between "work preservation" and "work acquisition" in this area distorts the primary/secondary inquiry under §§ 8(b)(4)(B) and 8(e) and "virtually defies principled application in a situation in which technological advances have altered the nature of the work to be performed." Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 2–3. However, while we acknowledge that the dichotomy may be susceptible to wooden application, we are not prepared to abandon it. The "acquisition"

Second, we believe the Board misconstrued our cases in suggesting that "eliminated" work can never be the object of a work preservation agreement. Technological innovation will often by design eliminate some aspect of an industry's work. For example, in *National Woodwork* the agreement at issue strove to preserve carpentry work done by hand at the jobsite, even though new off-site machining techniques had eliminated the necessity for much of this work. Yet the jobs of carpenters were no less threatened, nor was their attempt to preserve them any less primary, than if the contractor had decided to subcontract the cutting and fitting of doors to nonunion workers. Cf. *Fibreboard Corp.* v. *NLRB*, 379 U. S. 203, 209 (1964). Similarly, containers have eliminated some of the work of loading and unloading cargo by hand for all participants in the industry—longshoremen, truckers, and warehousers alike.[20] "Elimination" of work

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concept in the work preservation area originated in *National Woodwork*, where we distinguished *Allen Bradley*, 325 U. S. 797 (1945), as involving "a boycott to reach out to monopolize jobs or acquire new job tasks *when [union members'] own jobs are not threatened.*" 386 U. S., at 630–631 (emphasis added); see n. 15, *supra*. An agreement bargained for with the objective of work preservation in the face of a genuine job threat, however, is not "acquisitive" in the sense that concept was used in *National Woodwork*, even though it may have the incidental effect of displacing work that otherwise might be done elsewhere or not be done at all. See *Pipefitters*, 429 U. S., at 510, 526, 528–529, n. 16. Yet as the facts of *Allen Bradley* demonstrate, an agreement that reserves work for union members may also have an unlawful secondary objective. The preservation/acquisition dichotomy, when employed with the *Allen Bradley* distinction firmly in mind, can serve the useful purpose of aiding the inquiry regarding unlawful secondary objectives when an agreement attempts to secure work but "jobs are not threatened."

[20] See, *e. g.*, 266 N. L. R. B., at 255 ("With the introduction of containers, the off[-pier] [truck]drivers and their helpers . . . lost work themselves in connection with truckloading operations at pierside. In addition, dockworkers employed at trucking stations by motor carriers, after containerization, lost work in connection with FSL containers delivered directly over the road to warehouses, consignees, or interlining trucking stations . . .").

in the sense that it is made unnecessary by innovation is not of itself a reason to condemn work preservation agreements under §§ 8(b)(4)(B) and 8(e); to the contrary, such elimination provides the very premise for such agreements.

It must not be forgotten that the relevant inquiry under §§ 8(b)(4)(B) and 8(e) is whether a union's activity is primary or secondary—that is, whether the union's efforts are directed at its own employer on a topic affecting employees' wages, hours, or working conditions that the employer can control, or, instead, are directed at affecting the business relations of neutral employers and are "tactically calculated" to achieve union objectives outside the primary employer-employee relationship. See *National Woodwork*, 386 U. S., at 644–645; *Pipefitters*, 429 U. S., at 528–529, and n. 16. The various linguistic formulae and evidentiary mechanisms we have employed to describe the primary/secondary distinction are not talismanic nor can they substitute for analysis. See generally *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 386–390 (1969). The inquiry is often an inferential and fact-based one, at times requiring the drawing of lines "more nice than obvious." *Electrical Workers* v. *NLRB*, 366 U. S. 667, 674 (1961); see *Pipefitters*, *supra*, at 531 ("commonsense inference"). In this case, however, the ALJ, Board, and Court of Appeals all found that the ILA negotiated the Rules on Containers with the sole object of preserving work for its members and that there is no evidence of "any significant ILA interest in the labor relations of the class of employers boycotted by the Rules." 266 N. L. R. B., at 249. Furthermore, as the Fourth Circuit noted, this is not a case in which an avowed work preservation agreement "seeks to claim work so different from that traditionally performed by the bargaining unit employees" that a secondary objective might be inferred. 734 F. 2d, at 980.[21] When the objective of an agreement and its enforce-

[21] There is no disagreement among the factfinders that the loading and unloading of containers is the "functional equivalent" of the traditional

ment is so clearly one of work preservation, the lawfulness of the agreement under §§ 8(b)(4)(B) and 8(e) is secure absent some other evidence of secondary purpose.

In sum, we believe that the Board correctly identified as erroneous the ALJ's focus on the effect of the Rules on the work of employees outside the bargaining unit, but then fell into the same analytical trap. The crucial findings are that the ILA's objective consistently has been to preserve longshore work, and that the ILA's employers have the power to control assignment of that work. *ILA I*, 447 U. S., at 504. In light of these facts, further inquiry into the effects of the Rules as applied was inconsistent with our precedents in this concededly difficult area.

C

In *ILA I* it was argued that the Rules preserve work made "utterly useless" by containerization and thus are "nothing less than an invidious form of 'featherbedding' to block full implementation of modern technological progress." *Id.*, at 526–527 (BURGER, C. J., dissenting). Similar arguments are repeated today, see *post*, at 89, 90, and were presented in *National Woodwork* as well. See 386 U. S., at 644. Our response is no different than it was 18 years ago: "Those arguments are addressed to the wrong branch of government." *Ibid.*[22] Justice Harlan wrote separately in *National Woodwork* to underscore the Court's reasoning on this point:

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work of longshoremen, that is, handling cargo going onto or coming from a ship, *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 270 (1977); 266 N. L. R. B., at 237, and that this work is entirely separable from other aspects of container handling. *Id.*, at 234.

[22] It should also be noted that the same Congress that wrote § 8(b)(4)(B) enacted a separate "antifeatherbedding" provision. Section 8(b)(6) of the Act makes it an unfair labor practice for a union "to . . . cause an employer to pay . . . any money . . . for services which are not performed or not to be performed." 29 U. S. C. § 158(b)(6). We have noted that this provision is a "narrow prohibition," *Scofield* v. *NLRB*, 394 U. S. 423, 434 (1969), that does not prohibit payment for work actually done or offered, even if that work might be viewed as unnecessary or inefficient. *NLRB* v. *Gam-*

"The only question thus to be decided . . . is whether Congress meant, in enacting §§ 8(b)(4)(B) and 8(e) of the National Labor Relations Act, to prevent this kind of labor-management arrangement designed to forestall possible adverse effects upon workers arising from changing technology.

. . . . . .

"[B]oth sides of today's division in the Court agree that we must be especially careful to eschew a resolution of the issue according to our own economic ideas and to find one in what Congress has done.

. . . . . .

"In view of Congress' deep commitment to the resolution of matters of vital importance to management and labor through the collective bargaining process, and its recognition of the boycott as a legitimate weapon in that process, it would be unfortunate were this Court to attribute to Congress, on the basis of such an opaque legislative record, a purpose to outlaw the kind of collective bargaining and conduct involved in these cases. Especially at a time when Congress is continuing to explore methods for meeting the economic problems increasingly arising in this technological age from scientific advances, this Court should not take such a step until Congress has made unmistakably clear that it wishes wholly to exclude collective bargaining as one avenue of approach to solu-

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ble Enterprises, Inc., 345 U. S. 117, 123–124 (1953); *American Newspaper Publishers Assn.* v. *NLRB*, 345 U. S. 100, 104–106 (1953); see 93 Cong. Rec. 6441 (1947) (remarks of Sen. Taft) (§ 8(b)(6) not intended "to give to a board or a court the power to say that so many men are all right, and so many men are too many"). Because the Rules seek to preserve the actual work of loading and unloading containers at the pier, they do not constitute "featherbedding" that Congress has seen fit to prohibit. "If the company wants to require more work of its employees, let it strike a better bargain. The labor laws as presently drawn will not do so for it." *Scofield*, *supra*, at 434.

tions in this elusive aspect of our economy." *Id.*, at 648–650.

Congress has not altered the provisions at issue in the 18 years since *National Woodwork* was decided, nor has any new evidence been offered regarding Congress' original intent. In the meantime, management and labor alike have relied on the work preservation doctrine to guide their bargaining. In such circumstances we should follow the normal presumption of *stare decisis* in cases of statutory interpretation. See *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 736–737 (1977); *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974).

III

Under the Rules on Containers, the ILA has given up some 80% of all containerized cargo work and the technological "container revolution" has secured its position in the industry. We have often noted that a basic premise of the labor laws is that "collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole." *First National Maintenance Corp.* v. *NLRB*, 452 U. S. 666, 678 (1981). The Rules represent a negotiated compromise of a volatile problem bearing directly on the well-being of our national economy. We concur with the ALJ, Board, and Court of Appeals that the Rules on Containers are a lawful work preservation agreement. Nothing in this record supports a conclusion that their enforcement has had a secondary, rather than primary, objective. The judgment below is therefore

Affirmed.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

It is not surprising that neither the opinion of the Court today, nor the body of the opinion in *NLRB* v. *Longshoremen*, 447 U. S. 490 (1980) *(ILA I)*, contains the text of the

Rules that the Court is called upon to consider. Nor is it surprising that §§ 8(b)(4)(B) and 8(e) of the National Labor Relations Act are not set out in full in the body of those two opinions. For if one were to set the provisions of the Rules side by side with the provisions of the Act one could not help but conclude that the Rules are proscribed by those sections. It is only by stringing together a series of highly questionable propositions that the Court has arrived at the contrary result. In my view, Congress did not intend the union activities at issue to be sanctioned by the National Labor Relations Act.

The Rules on Containers, an agreement entered into between various shipowners and the International Longshoremen's Association (ILA), begin by proclaiming their intent to "preserve the work jurisdiction of longshoremen and all other ILA crafts . . . ." They move on to define certain classes of containers which "shall be loaded or discharged . . . at a waterfront facility by deepsea ILA labor." Among the containers which must be so handled are those described by Rule 1(a)(3)—"[c]ontainers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employees," provided that such unloading takes place within 50 miles of the port and that the cargo is not warehoused for more than 30 days. If the containers are first unloaded more than 50 miles from the port then they need not be unloaded by ILA labor.

Rule 7 sets forth sanctions to be imposed on employers and any other entity violating the Rules. Each time a container passes over the pier in violation of the Rules the shipping employer pays the union $1,000 in "liquidated damages"; in addition, Rule 7(d) states that both the employer and the ILA will cease doing business with "[a]ny facility operated in violation of the Container Rules."

The effect of these Rules is well illustrated by their application to the trucking practice known as "shortstopping"—one of the classes of work with respect to which the Board found the Rules to be work acquisitive. Prior to contain-

erization, longshoremen unloaded cargo breakbulk from the ship and moved it to trucks for inland transport. Despite the fact that the trucks already had been loaded at the pier, truckers often stopped at nearby trucking terminals, where the trucks were unloaded and again carefully reloaded so as to meet gross weight and weight distribution requirements for long distance carrying. This practice is known as "shortstopping," and it is quite clearly related to the needs of the trucking, not the shipping, business.

After containerization there was no longer a need for ILA unloading at the pier. The containers could be lifted directly from the ship's hold and placed on a truck chassis. Nevertheless, the trucks might still be "shortstopped" for the same reasons as before. What the Rules—in this case Rule 1(a)(3)—do is to require that the containers be unloaded by ILA labor at the pier despite the fact that such unloading is now completely unnecessary. If the containers are subsequently shortstopped, unloading and loading which need be done only once is instead done twice. The result is that the principal advantage of containerization—that the cargo need not be handled breakbulk at the pier—is lost. And if the truckers shortstop a container that has not been unloaded by the ILA, they are subject to Rule 7 sanctions, including the refusal of the shippers to supply the truckers with containers.

Section 8(b) of the National Labor Relations Act provides, in pertinent part:

> "It shall be an unfair labor practice for a labor organization or its agents—
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> . . . . .
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> "(4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce where in either case an object thereof is—
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> . . . . .
>
> "(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or

> manufacturer, or to cease doing business with any other person . . . *Provided*, [t]hat nothing contained in this clause (B) shall be construed to make unlawful, when not otherwise unlawful, any primary strike or primary picketing. . . ."

Section 8(e) of the National Labor Relations Act similarly states:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . ."

It should be evident that the Rules violate the plain language of § 8(e). The Rules constitute an "agreement" between an employer and a labor organization "whereby [the] employer . . . agrees . . . to cease doing business with any other person. . . ." That is the import of Rule 7(d). Nor can it be doubted on the facts here that the union has transgressed the plain language of § 8(b)(4)(B) by seeking to enforce the agreement through coercing the shipowners to stop providing containers to certain entities that were violating the Rules. As a matter of plain language, one would not think that the union's actions here fell within the statutory exception for "primary strikes or primary picketing." Finally, I think it fairly obvious why Congress would seek to prohibit such activity by labor unions. As illustrated by this very case, absent such restrictions unions are free to exercise their considerable power, through concerted action, to manipulate the allocation of resources in our economy—even to the point where in the name of "work preservation" a union could literally halt technological advance.

One might well ask, then, how §§ 8(e) and 8(b)(4)(B) have been construed so as not to preclude the actions at issue here. It has not been a simple process. Beginning with *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612 (1967), this Court explained its understanding that the exception in § 8(b)(4)(B) for "primary strikes or primary picketing" indicated that Congress only intended to preclude "secondary activity" under that section. Then, relying only on the ambiguous legislative history of § 8(e), the Court concluded that that section also was intended to preclude only "secondary" activity. Admittedly, at least with respect to § 8(b)(4)(B) this distinction has some support in the language of the statute, and even has some usefulness despite the fact that, as the Court recognizes, *ante*, at 81, the primary/secondary distinction is perhaps one of the gauziest of legal concepts. But assuming that Congress did not intend § 8(e) to extend to certain kinds of agreements that could be described as "primary," it does not follow from that concession that "work preservation" is one of the "primary" activities that the statutes do not prohibit.

Yet that is the conclusion that the Court reached in *National Woodwork*, and the work preservation/work acquisition distinction provides the basis for the conclusion the Court reaches today. As refined by the Court, it now appears that, at least where a particular union's jobs are "threatened," an agreement will be considered valid so long as the union's subjective intent is to preserve union jobs and the union conducts its bargaining with an employer who has "control" over those jobs; it is only where the agreement is "tactically calculated to satisfy union objectives elsewhere," *ante*, at 78, that the agreement will be considered work acquisitive. In applying this test, we are told first that we must look to "'all the surrounding circumstances,'" *ante*, at 75 (quoting *National Woodwork*), to determine whether the union's objective was work preservation, or the acquisition

of work traditionally done by others. In almost the same breath, however, we are told that here the Board committed fundamental error by "focusing on the effect that the Rules may have on 'shortstopping' truckers and 'traditional' warehousers," because such "extra-unit effects" are "'irrelevant' to the analysis." *Ante*, at 79 (quoting *ILA I*).

These directives appear contradictory, for it would seem difficult indeed to determine whether a particular agreement is "work acquisitive" without focusing, to some degree, on the work that is being acquired. It may be that the Court today ultimately resolves this problem by establishing that the only test is whether the union subjectively intended to do more than preserve work it had always done, but if so I cannot agree that the test accurately separates "primary" from "secondary" activity, nor can I agree that the resulting test comports with Congress' intent in enacting §§ 8(b)(4)(B) and 8(e).

As to the relationship between the Court's test and Congress' intent, I note that today the Court forthrightly admits that a "work preservation" agreement will not be illegal despite the fact that its intent is to preserve work that has been entirely "eliminated" by technological change. As noted previously, such agreements can result in "preserving" work merely by requiring duplication, thereby forcing an employer to pay for labor that no longer has an economic use. Indeed, one of the reasons stated by the Court of Appeals for the Fourth Circuit for *upholding* the Rules as applied to "shortstopping" was that, given that under the Rules ILA labor would have to unload at the pier any container that was going to be shortstopped, there still was no indication in the record that the ILA had "acquired" any work, because there was no indication that the containers would not be shortstopped in any event when they reached the trucking terminal. *American Trucking Assns., Inc.* v. *NLRB*, 734 F. 2d 966, 979 (1984). As THE CHIEF JUSTICE noted in his dissent in *ILA*

I, the upshot of allowing unions to enter into such agreements is that they may render change so difficult, by artificially raising the costs of a new system, that they stifle technological advance. *ILA I*, 447 U. S., at 526–527 (BURGER, C. J., dissenting). It is hard to believe that the Congress which enacted a statute that by its plain terms would have prohibited such agreements nevertheless intended to sanction agreements requiring such make-work.

It is no answer to these objections that Congress intended the collective-bargaining process to take care of the various economic problems raised by union work preservation agreements such as those at issue. It is true that Congress established collective bargaining as the primary tool for resolving most labor disputes. But if private ordering were sufficient to alleviate all labor problems then there would be no need for labor laws. Instead, Congress enacted comprehensive labor legislation for the "establishment and maintenance of industrial peace to preserve the flow of interstate commerce." *First National Maintenance Corp.* v. *NLRB*, 452 U. S. 666, 674 (1981). Obviously, in enacting §§ 8(b)(4)(B) and 8(e) Congress identified certain union conduct which should be prohibited whether or not the underlying dispute could be resolved through collective bargaining. With respect to these sections Congress targeted union activity which raised restraints on trade that, if not prohibited by the antitrust laws, must be addressed by other means. See *National Woodwork*, 386 U. S., at 656–657 (Stewart, J., dissenting).

A decent regard for *stare decisis* suggests that battle be not again joined on the question decided in *National Woodwork*, but to me the dubious correctness of that decision indicates that the Court should not expand it beyond its facts, and should now try to move in the direction of the plain language of the statutes in those cases not clearly covered by *National Woodwork*. I can agree that § 8(e) cannot be read

with a slavish literalism, because many labor-management "agreements" will entail some secondary effects on the employer's business relations that Congress would not have intended to proscribe. Similarly, I can concede that many "agreements" motivated by a desire for "work preservation" are lawful under the NLRA. Thus, a union faced with loss of jobs might agree to a pay cut to preserve the work of its members. But for me there is a difference between such "primary" activity and an agreement that an employer will refrain from doing business with a third party so that a union may retain its jobs. Through such agreements a union can extend its influence beyond the unit employer and the traditional bargaining issues of wages, hours, and working conditions, and expand the labor dispute to those "neutral" employers who participate in the employer's markets. In the context of technological change, the union's agreement may put the third party out of business before it ever begins. That is the "secondary" activity with which Congress was concerned.

The primary/secondary distinction is not, of course, capable of precise application. The classic "secondary" activity, whereby a union that has a dispute with employer A exerts economic pressure on employer B to further its goals with respect to employer A, is not really present in this case. Here the union's direct contact has been with the primary employers, the shipowners. But as noted previously, there is little reason to believe that in enacting §§ 8(b)(4)(B) and 8(e) Congress intended to prevent only this type of influencing of secondary employers. Moreover, even meeting the Court on its own terms and applying its formulation of "secondary" activity, I believe that as applied to "shortstopping" and traditional warehouse work the Rules have an unlawful secondary objective.

There is no dispute that "shortstopping" occurred even when longshoremen regularly unloaded cargo breakbulk from the ships and the cargo was placed into trucks. Similarly,

some ship cargo traditionally was taken to nearby warehouses for storage, awaiting ultimate distribution. As discussed previously, containerization made it possible to take entire truckloads directly from the ship's hold to these warehouses and truck terminals, so that a loading and unloading process that used to take place twice now need be done only once. The Rules ensure that in these circumstances the containers will be unloaded once by ILA labor; it does not take much insight to recognize, therefore, that the natural tendency of the Rules will be to bring the truck terminals and warehouses to the pier, so that to the greatest extent possible the containers will only have to be unloaded once, with the "shortstopping" and warehousing being performed by ILA members. This will be the only means for these trucker and warehouse employers to compete with those who handle containers exempt from the Rules, and who have only the costs of one handling to pass along to their customers.

This scenario convinces me that the Rules constitute illegal secondary activity. Absent the Rules it would have been business as usual for the truckers and warehousemen; with the Rules they are subject to refusals to deal, to possible fines from the shippers who own the containers, and perhaps to difficult decisions concerning the course that their own businesses and employee relations will take. They are the "'unoffending employers'" who have been mulcted in a labor dispute "'not their own.'" *National Woodwork, supra*, at 626–627 (quoting *NLRB* v. *Denver Bldg. Trades Council*, 341 U. S. 675, 692 (1951)). Such pressures are what the statutes were intended to protect against. Moreover, from this standpoint the Rules are work acquisitive; however pure the motives of the union might be the result of the Rules is likely to be that the ILA receives work and the truckers and warehousemen lose it.

The conclusion that the Rules are secondary—and work acquisitive—in the case before us is supported by a look at how the Rules actually are structured with respect to "short-

stopping" and warehousing. For present purposes I accept the Court's suggestion that when containers were first introduced the ILA could simply have boycotted all containers by refusing to unload any of them. It does not follow, however, that because the ILA could legally boycott all containers it therefore can single out which containers it is entitled to unload. Rule 1(a)(3) preserves for the ILA the right to unload any container destined for a single consignee which is unloaded within 50 miles of the port, and which is not unloaded by the employees of an ultimate consignee or warehoused for more than 30 days. The record does not indicate that this Rule applies to work done by any employers other than shortstopping truckers, short-term warehousemen, and "consolidators." Of these, both the truckers and warehousemen performed the unloading task prior to containerization. Given this history it should be clear that at least this part of the Rule must be considered secondary. Failing, for whatever reason, to preclude the advent of containers altogether, and recognizing that containers would eliminate a large portion of their work, the ILA apparently looked around for similar work close enough to the pier to claim as its own. It found it in the work performed by truckers and warehousemen. I can only view Rule 1(a)(3), which is specifically directed at that work, as intentionally work acquisitive.

The Court avoids this conclusion by stating the test as whether the union's objective was to preserve its traditional work, and by pretending to accept the ALJ's and the Board's "findings" that "the ILA's objective consistently has been to preserve longshore work . . . ." *Ante*, at 81–82. I, of course, agree with the Court that the Board's factual findings must be accepted if supported by substantial evidence, and that deference is due to the Board's construction of the Act, *ante*, at 78, but the Board did not make the findings the Court cites. The Board accepted the ALJ's finding that the "ILA had an *overall* work preservation objective in negotiating the Rules," see 266 N. L. R. B. 230, 236 (1983), but

both the Board and the ALJ concluded that as applied to "shortstopping" and some warehousing the Rules were work-acquisitive. Although their rationales were articulated differently, I believe that both bodies were expressing the sentiments expressed above—both the intent and effect of this part of the Rules were to obtain work not traditionally done by longshoremen. In concluding otherwise the Court engages in nothing but a shell game—it hides the ILA's work acquisition under one shell and then forces all attention on the limited question of the union's intent in bargaining with its employer. By broadly defining the work traditionally done by longshoremen and refusing to allow a review of the larger economic scene, the Court manages to turn over only shells representing work preservation. This latest refinement moves even further from the language and intent of §§ 8(b)(4)(B) and 8(e). I would reverse the decision of the Court of Appeals for the Fourth Circuit.

Syllabus

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 83–1894. Argued February 27, 1985—Reargued April 22, 1985—Decided June 27, 1985

Petitioner national labor union's constitution provides that resignations from the union are not permitted during a strike. The union fined 10 members who, in violation of this provision, resigned during a strike by petitioner local unions and returned to work. Respondent employer representative thereafter filed charges with the National Labor Relations Board (Board), claiming that such levying of fines constituted an unfair labor practice under § 8(b)(1)(A) of the National Labor Relations Act, which makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of their § 7 rights. The Board agreed, and the Court of Appeals enforced the Board's order.

Held: In related cases this Court has invariably yielded to Board decisions on whether fines imposed by a union "restrained or coerced" employees. Moreover, the Board has consistently construed § 8(b)(1)(A) as prohibiting the fining of employees who have resigned from a union contrary to a restriction in the union constitution. Therefore, the Board's decision in this case is entitled to this Court's deference. Pp. 100–116.

(a) The Board was justified in concluding that by restricting the right of employees to resign, the provision in question impaired the congressional policy of voluntary unionism implicit in § 8(a)(3) of the Act. Pp. 104–107.

(b) The proviso to § 8(b)(1)(A), which states that nothing in § 8(b)(1)(A) shall "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein," was intended to protect union rules involving admission and expulsion and not to allow unions to make rules restricting the right to resign. Accordingly, the Board properly concluded that the provision in question is not a "rule with respect to the retention of membership." Pp. 108–110.

(c) The legislative history does not support petitioners' contention that Congress did not intend to protect the right of union members to resign. Pp. 110–112.

(d) Nor is there any merit to petitioners' argument that because the common law does not prohibit restrictions on resignation, the provision in question does not violate § 8(b)(1)(A). Pp. 112–114.

724 F. 2d 57, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 116. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 117. STEVENS, J., filed a dissenting opinion, *post*, p. 133.

Laurence Gold reargued the cause for petitioners. With him on the briefs were *Marsha S. Berzon*, *Michael Rubin*, *George Kaufmann*, and *David M. Silberman*.

Deputy Solicitor General Fried reargued the cause for respondent National Labor Relations Board. With him on the brief were *Solicitor General Lee*, *Norton J. Come*, and *Linda Sher*. *Edward J. Fahy* filed a brief for respondent Rockford-Beloit Pattern Jobbers Association.*

JUSTICE POWELL delivered the opinion of the Court.

The Pattern Makers' League of North America, AFL–CIO (League), a labor union, provides in its constitution that resignations are not permitted during a strike or when a strike is imminent. The League fined 10 of its members who, in violation of this provision, resigned during a strike and returned to work. The National Labor Relations Board held that these fines were imposed in violation of § 8(b)(1)(A) of the National Labor Relations Act, 29 U. S. C. § 158(b)(1)(A). We granted a petition for a writ of certiorari in order to decide whether § 8(b)(1)(A) reasonably may be construed by the

**Paul Alan Levy* and *Alan B. Morrison* filed a brief for Teamsters for a Democratic Union as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States by *Carl L. Taylor*, *Glenn Summers*, and *Stephan A. Bokat*; for the National Right to Work Legal Defense Foundation by *Raymond J. LaJeunesse, Jr.*; and for Safeway Stores, Inc., et al. by *Warren M. Davison* and *Wesley J. Fastiff*.

Board as prohibiting a union from fining members who have tendered resignations invalid under the union constitution.

I

The League is a national union composed of local associations (locals). In May 1976, its constitution was amended to provide that

> "[n]o resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent."

This amendment, known as League Law 13, became effective in October 1976, after being ratified by the League's locals. On May 5, 1977, when a collective-bargaining agreement expired, two locals began an economic strike against several manufacturing companies in Rockford, Illinois, and Beloit, Wisconsin. Forty-three of the two locals' members participated. In early September 1977, after the locals formally rejected a contract offer, a striking union member submitted a letter of resignation to the Beloit Association.[1] He returned to work the following day. During the next three months, 10 more union members resigned from the Rockford and Beloit locals and returned to work. On December 19, 1977, the strike ended when the parties signed a new collective-bargaining agreement. The locals notified 10 employees who had resigned that their resignations had been rejected as violative of League Law 13.[2] The locals further informed the

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[1] William Kohl complained in his letter: "I no longer feel that the union officers are acting in the best interest of the men. We need fair and reasonable negotiators to solve our problems." 3 Record, General Counsel Exhibit 2.

[2] Kohl, the other employee who returned to work, was expelled from the union. On January 14, 1978, the Beloit local notified Kohl's employer that because he was no longer a union member, he should be discharged pursuant to the "union shop" agreement. Two weeks later, the Beloit

employees that, as union members, they were subject to sanctions for returning to work. Each was fined approximately the equivalent of his earnings during the strike.

The Rockford-Beloit Pattern Jobbers' Association (Association) had represented the employers throughout the collective-bargaining process. It filed charges with the Board against the League and its two locals, the petitioners. Relying on § 8(b)(1)(A), the Association claimed that levying fines against employees who had resigned was an unfair labor practice.[3] Following a hearing, an Administrative Law Judge found that petitioners had violated § 8(b)(1)(A) by fining employees for returning to work after tendering resignations. *Pattern Makers' League of North America*, 265 N. L. R. B. 1332, 1339 (1982) (decision of G. Wacknov, ALJ). The Board agreed that § 8(b)(1)(A) prohibited the union from imposing sanctions on the 10 employees.[4] *Pattern Makers'*

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local informed Kohl that he could gain readmission to the union, and thus remain employed, if he paid back dues, a readmission fee, and $4,200 in "damages . . . for deserting the strike by returning to work." *Pattern Makers' League of North America*, 265 N. L. R. B. 1332, 1337 (1982) (decision of G. Wacknov, ALJ). Kohl was denied readmission to the union because he refused to pay the amounts allegedly due. Nevertheless, he was not discharged by his employer. *Ibid.*

[3] The Association also charged that petitioners committed the following unfair labor practices: (i) threatening employees with physical harm and loss of accrued pension benefits if they returned to work during the strike; and (2) attempting to have Kohl and another employee, John Nelson, discharged pursuant to a "union shop" agreement. *Ibid.* These charges are unrelated to the question presented in this case. Therefore, we express no opinion concerning the disposition of these claims by the ALJ, the Board, and the Court of Appeals.

[4] Writing separately, Member Fanning asserted that a restriction on the right to resign would not violate § 8(b)(1)(A) if it functioned only to prevent members from removing their names from the union's rolls. He agreed, however, that the employees could not be fined for returning to work after tendering their resignations. *Pattern Makers' League of North America*, *supra*, at 1335 (Member Fanning, concurring and dissenting in part). Member Jenkins dissented, as he did in *Machinist Local 1327 (Dalmo Victor II)*, 263 N. L. R. B. 984 (1982), enf. denied, 725 F. 2d 1212 (CA9 1984). See n. 5, *infra*.

League of North America, supra. In holding that League Law 13 did not justify the imposition of fines on the members who attempted to resign, the Board relied on its earlier decision in *Machinists Local 1327 (Dalmo Victor II)*, 263 N. L. R. B. 984 (1982), enf. denied, 725 F. 2d 1212 (CA9 1984).[5]

The United States Court of Appeals for the Seventh Circuit enforced the Board's order. 724 F. 2d 57 (1983). The Court of Appeals stated that by restricting the union members' freedom to resign, League Law 13 "frustrate[d] the overriding policy of labor law that employees be free to choose whether to engage in concerted activities." *Id.*, at 60. Noting that the "mutual reliance" theory was given little weight in *NLRB* v. *Textile Workers*, 409 U. S. 213 (1972), the court rejected petitioners' argument that their members, by participating in the strike vote, had "waived their Section 7 right to abandon the strike." 724 F. 2d, at 60–61. Finally, the Court of Appeals reasoned that under *Scofield*

[5] In *Machinists Local 1327 (Dalmo Victor II)*, several employees resigned from a union and returned to work during a strike. The union constitution prohibited resignations during, or within 14 days preceding, strikes. As in this case, the employees' resignations were not accepted, and they were fined for aiding and abetting the employer. The Board held that fining these employees for returning to work after tendering resignations violated § 8(b)(1)(A).

Chairman Van de Water and Member Hunter stated that no restriction on the right to resign was permissible under the Act; they reasoned that such a rule allowed the union to exercise control over "external matters." Moreover, these Board members thought that restrictions on resignation impaired the congressional policy, embodied in § 8(a)(3), of voluntary unionism. Therefore, they concluded that any discipline premised on such a rule violates § 8(b)(1)(A). 263 N. L. R. B., at 988.

Members Fanning and Zimmerman asserted that a rule legitimately could restrict the right to resign for a period of 30 days. Because the rule in question restricted the right to resign indefinitely, however, they agreed that the union had violated § 8(b)(1)(A). *Id.*, at 987.

Member Jenkins, the lone dissenter, contended that the union's restriction on resignation was protected by the proviso to § 8(b)(1)(A), which states that a union may "prescribe its own rules with respect to the acquisition or retention of membership therein." *Id.*, at 993.

v. *NLRB*, 394 U. S. 423 (1969), labor organizations may impose disciplinary fines against members only if they are "free to leave the union and escape the rule[s]." 724 F. 2d, at 61.

We granted a petition for a writ of certiorari, 469 U. S. 814 (1984), to resolve the conflict between the Courts of Appeals over the validity of restrictions on union members' right to resign.[6] The Board has held that such restrictions are invalid and do not justify imposing sanctions on employees who have attempted to resign from the union. Because of the Board's "special competence" in the field of labor relations, its interpretation of the Act is accorded substantial deference. *NLRB* v. *Weingarten, Inc.*, 420 U. S. 251, 266 (1975). The question for decision today is thus narrowed to whether the Board's construction of § 8(b)(1)(A) is reasonable. See *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822, 830 (1984). We believe that § 8(b)(1)(A) properly may be construed as prohibiting the fining of employees who have tendered resignations ineffective under a restriction in the union constitution. We therefore affirm the judgment of the Court of Appeals enforcing the Board's order.

II

A

Section 7 of the Act, 29 U. S. C. § 157, grants employees the right to "refrain from any or all [concerted] . . . activities . . . ."[7] This general right is implemented by

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[6] The Court of Appeals for the Ninth Circuit has held that a union may impose restrictions on its members' right to resign. *Machinists Local 1327 (Dalmo Victor II), supra.* See n. 5, *supra*, for a discussion of the Board decision that the Court of Appeals for the Ninth Circuit refused to enforce.

[7] Section 7 of the Act, as set forth in 29 U. S. C. § 157, provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall

§ 8(b)(1)(A). The latter section provides that a union commits an unfair labor practice if it "restrain[s] or coerce[s] employees in the exercise" of their § 7 rights.[8] When employee members of a union refuse to support a strike (whether or not a rule prohibits returning to work during a strike), they are refraining from "concerted activity." Therefore, imposing fines on these employees for returning to work "restrain[s]" the exercise of their § 7 rights. Indeed, if the terms "refrain" and "restrain or coerce" are interpreted literally, fining employees to enforce compliance with any union rule or policy would violate the Act.

Despite this language from the Act, the Court in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), held that § 8(b)(1)(A) does not prohibit labor organizations from fining current members. In *NLRB* v. *Textile Workers*, *supra*, and *Machinists* v. *NLRB*, 412 U. S. 84 (1973) *(per curiam)*, the Court found as a corollary that unions may not fine former members who have resigned lawfully. Neither *Textile Workers*, *supra*, nor *Machinists*, *supra*, however, involved a provision like League Law 13, restricting the members' right to resign. We decide today whether a union is precluded from fining employees who have attempted to resign when resignations are prohibited by the union's constitution.[9]

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also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

[8] Section 8(b)(1)(A), as set forth in 29 U. S. C. § 158(b)(1)(A), provides:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ."

[9] In both *Textile Workers*, 409 U. S., at 217, and *Machinists*, 412 U. S., at 88, the Court explicitly left open the question of "the extent to which

B

The Court's reasoning in *Allis-Chalmers*, *supra*, supports the Board's conclusion that petitioners in this case violated § 8(b)(1)(A). In *Allis-Chalmers*, the Court held that imposing court-enforceable fines against current union members does not "restrain or coerce" the workers in the exercise of their § 7 rights.[10] In so concluding, the Court relied on the legislative history of the Taft-Hartley Act. It noted that the sponsor of § 8(b)(1)(A) never intended for that provision "'to interfere with the internal affairs or organization of unions,'" 388 U. S., at 187, quoting 93 Cong. Rec. 4272 (1947) (statement of Sen. Ball), and that other proponents of the measure likewise disclaimed an intent to interfere with unions' "internal affairs." 388 U. S., at 187–190. From the legislative history, the Court reasoned that Congress did not intend to prohibit unions from fining present members, as this was an internal matter. The Court has emphasized that the crux of *Allis-Chalmers*' holding was the distinction between "internal and external enforcement of union rules . . . ." *Scofield* v. *NLRB*, 394 U. S., at 428. See also *NLRB* v. *Boeing Co.*, 412 U. S. 67, 73 (1973).

The congressional purpose to preserve unions' control over their own "internal affairs" does not suggest an intent to authorize restrictions on the right to resign. Traditionally, union members were free to resign and escape union disci-

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contractual restriction on a member's right to resign may be limited by the Act." *Ibid.*

[10] The proviso to § 8(b)(1)(A), 29 U. S. C. § 158(b)(1)(A), states that nothing in the section shall "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The Court in *Allis-Chalmers* assumed that the proviso could not be read to authorize the imposition of court-enforceable fines. 388 U. S., at 192. See *NLRB* v. *Boeing Co.*, 412 U. S. 67, 71, n. 5 (1973) ("This Court . . . , in holding that court enforcement of union fines was not an unfair labor practice in *NLRB* v. *Allis-Chalmers Mfg. Co.*, relied on congressional intent only with respect to the first part of this section") (citation omitted).

pline.[11] In 1947, union constitutional provisions restricting the right to resign were uncommon, if not unknown.[12] Therefore, allowing unions to "extend an employee's membership obligation through restrictions on resignation" would "expan[d] the definition of internal action" beyond the contours envisioned by the Taft-Hartley Congress. *International Assn. of Machinists, Local 1414 (Neufeld Porsche-Audi, Inc.)*, 270 N. L. R. B. No. 209, p. 11 (1984).[13]

C

Language and reasoning from other opinions of this Court confirm that the Board's construction of § 8(b)(1)(A) is rea-

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[11] See *Bossert* v. *Dhuy*, 221 N. Y. 342, 365, 117 N. E. 582, 587 (1917) ("The members of the organization . . . who are not willing to obey the orders of the organization are at liberty to withdraw therefrom"); *Barker Painting Co.* v. *Brotherhood of Painters*, 57 App. D. C. 322, 324, 23 F. 2d 743, 745, cert. denied, 276 U. S. 631 (1928) (It is "not unlawful for . . . unions to punish a member by fine, suspension, or expulsion for an infraction of the union rules, since membership in the union is purely voluntary"); *Bayer* v. *Brotherhood of Painters, Decorators and Paperhangers of America, Local 301*, 108 N. J. Eq. 257, 262, 154 A. 759, 761 (1931) ("association is a voluntary one, and the workmen may decline to become members or withdraw from membership, if dissatisfied with the conduct of its affairs"); *Mische* v. *Kaminski*, 127 Pa. Super. 66, 91–92, 193 A. 410, 421 (1937) (members "had a right to leave the union"); *Longshore Printing Co.* v. *Howell*, 26 Ore. 527, 540, 38 P. 547, 551 (1894) ("No resort can be had to compulsory methods of any kind either to increase, keep up, or retain such membership").

[12] Our attention has not been called to any provision limiting the right to resign in a union constitution extant in 1947. Indeed, even by the 1970's, very few unions had such restrictions in their constitutions. See Millan, Disciplinary Developments Under § 8(b)(1)(A) of the National Labor Relations Act, 20 Loyola L. Rev. 245, 269 (1974); Wellington, Union Fines and Workers' Rights, 85 Yale L. J. 1022, 1042 (1976).

[13] In *International Assn. of Machinists, Local 1414 (Neufeld Porsche-Audi, Inc.)*, a majority of the Board held that *any* restriction on the right to resign violates the Act. This was the position taken by Chairman Van de Water and Member Hunter in *Machinists Local 1327 (Dalmo Victor II)*, 263 N. L. R. B. 984 (1982), enf. denied, 725 F. 2d 1212 (CA9 1984). See n. 5, *supra*.

sonable. In *Scofield* v. *NLRB*, *supra*, the Court upheld a union rule setting a ceiling on the daily wages that members working on an incentive basis could earn. The union members' freedom to resign was critical to the Court's decision that the union rule did not "restrain or coerce" the employees within the meaning of § 8(b)(1)(A). It stated that the rule was "reasonably enforced against union members who [were] free to leave the union and escape the rule." *Id.*, at 430. The Court deemed it important that if members were unable to take full advantage of their contractual right to earn additional pay, it was because they had "chosen to become *and remain* union members." *Id.*, at 435 (emphasis added).

The decision in *NLRB* v. *Textile Workers*, 409 U. S. 213 (1972), also supports the Board's view that § 8(b)(1)(A) prohibits unions from punishing members not free to resign. There, 31 employees resigned their union membership and resumed working during a strike. We held that fining these former members "restrained or coerced" them, within the meaning of § 8(b)(1)(A). In reaching this conclusion, we said that "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May." *Id.*, at 217–218. Restrictions on the right to resign curtail the freedom that the *Textile Workers* Court deemed so important. See also *Machinists* v. *NLRB*, 412 U. S. 84 (1973).

III

Section 8(b)(1)(A) allows unions to enforce only those rules that "impai[r] no policy Congress has imbedded in the labor laws . . . ." *Scofield*, *supra*, at 430. The Board has found union restrictions on the right to resign to be inconsistent with the policy of voluntary unionism implicit in § 8(a)(3).[14]

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[14] Section 8(a)(3), as set forth in 29 U. S. C. § 158(a)(3), provides:

"It shall be an unfair labor practice for an employer—

. . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership

See *International Assn. of Machinists, Inc., Local 1414 (Neufeld Porsche-Audi, Inc.), supra; Machinists Local 1327 (Dalmo Victor II)*, 263 N. L. R. B., at 992 (Chairman Van de Water and Member Hunter, concurring). We believe that the inconsistency between union restrictions on the right to resign and the policy of voluntary unionism supports the Board's conclusion that League Law 13 is invalid.

Closed shop agreements, legalized by the Wagner Act in 1935,[15] became quite common in the early 1940's. Under these agreements, employers could hire and retain in their employ only union members in good standing. R. Gorman,

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in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . : *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 8(b)(2) of the Act, as set forth in 29 U. S. C. § 158(b)(2), complements § 8(a)(3) by providing that:

"It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

[15] Section 8(3) of the Wagner Act, ch. 372, 49 Stat. 452, generally barred discrimination based on union membership. A proviso to that section stated, however, that "nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . ."

Labor Law, ch. 28, § 1, p. 639 (1976). Full union membership was thus compulsory in a closed shop; in order to keep their jobs, employees were required to attend union meetings, support union leaders, and otherwise adhere to union rules. Because of mounting objections to the closed shop, in 1947—after hearings and full consideration—Congress enacted the Taft-Hartley Act. Section 8(a)(3) of that Act effectively eliminated compulsory union membership by outlawing the closed shop. The union security agreements permitted by § 8(a)(3) require employees to pay dues, but an employee cannot be discharged for failing to abide by union rules or policies with which he disagrees.[16]

Full union membership thus no longer can be a requirement of employment. If a new employee refuses formally to join a union and subject himself to its discipline, he cannot be fired. Moreover, no employee can be discharged if he initially joins a union, and subsequently resigns. We think it noteworthy that § 8(a)(3) protects the employment rights of the dissatisfied member, as well as those of the worker who never assumed full union membership. By allowing employees to resign from a union at any time, § 8(a)(3) protects the employee whose views come to diverge from those of his union.

League Law 13 curtails this freedom to resign from full union membership. Nevertheless, petitioners contend

[16] Under § 8(a)(3), the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues. See *Radio Officers* v. *NLRB*, 347 U. S. 17, 41 (1954) (union security agreements cannot be used for "any purpose other than to compel payment of union dues and fees"). "'Membership,' as a condition of employment, is whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U. S. 734, 742 (1963). See also *Ellis* v. *Railway Clerks*, 466 U. S. 435 (1984) (under the Railway Labor Act, employees in a "union shop" cannot be compelled to pay dues to support certain union activities). Therefore, an employee required by a union security agreement to assume financial "membership" is not subject to union discipline. Such an employee is a "member" of the union only in the most limited sense.

that League Law 13 does not contravene the policy of voluntary unionism imbedded in the Act. They assert that this provision does not interfere with workers' employment rights because offending members are not discharged, but only fined. We find this argument unpersuasive, for a union has not left a "worker's employment rights inviolate when it exacts [his entire] paycheck in satisfaction of a fine imposed for working." Wellington, Union Fines and Workers' Rights, 85 Yale L. J. 1022, 1023 (1976). Congress in 1947 sought to eliminate completely any requirement that the employee maintain full union membership.[17] Therefore, the Board was justified in concluding that by restricting the right of employees to resign, League Law 13 impairs the policy of voluntary unionism.

IV

We now consider specifically three arguments advanced by petitioners: (i) union rules restricting the right to resign are protected by the proviso to § 8(b)(1)(A); (ii) the legislative history of the Act shows that Congress did not intend to protect the right of union members to resign; and (iii) labor unions should be allowed to restrict the right to resign because other voluntary associations are permitted to do so.[18]

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[17] The focus of § 8(a)(3) on employment rights is understandable because union restrictions on the right to resign were not an issue in 1947. See n. 12, *supra*, and accompanying text. Senator Taft, for example, stated that § 8(a)(3) was designed to prevent the discharge of workers for reasons other than nonpayment of dues, 93 Cong. Rec. 4885–4886 (1947), because this was "the usual type of abuse, and is the only type of abuse testified to." *Id.*, at 4886.

[18] The dissent suggests that the Board's decision is inconsistent with 29 U. S. C. § 163, which provides that nothing in the Act "shall be construed so as . . . to interfere with or impede or diminish in any way the right to strike." The Board does not believe, and neither do we, that its interpretation of § 8(b)(1)(A) impedes the "right to strike." "It [will] not outlaw anybody striking who want[s] to strike. It [will] not prevent anyone using the strike in a legitimate way . . . . All it [will] do [is] . . . outlaw such

A

Petitioners first argue that the proviso to § 8(b)(1)(A) expressly allows unions to place restrictions on the right to resign. The proviso states that nothing in § 8(b)(1)(A) shall "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U. S. C. § 158(b)(1)(A). Petitioners contend that because League Law 13 places restrictions on the right to withdraw from the union, it is a "rul[e] with respect to the . . . retention of membership," within the meaning of the proviso.[19]

Neither the Board nor this Court has ever interpreted the proviso as allowing unions to make rules restricting the right

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restraint and coercion as would prevent people from going to work if they wished to go to work." 93 Cong. Rec. 4436 (1947) (remarks of Sen. Taft).

Moreover, we do not believe that the effectiveness of strikes will be unduly hampered by the Board's decision. An employee who voluntarily has joined a union will be reluctant to give up his membership. As Dean Wellington has said:

"In making his resignation decision, the dissident must remember that the union whose policies he finds distasteful will continue to hold substantial economic power over him as exclusive bargaining agent. By resigning, the worker surrenders his right to vote for union officials, to express himself at union meetings, and even to participate in determining the amount or use of dues he may be forced to pay under a union security clause." Wellington, Union Fines and Workers' Rights, 85 Yale L. J. 1022, 1046 (1976).

[19] JUSTICE BLACKMUN's dissent asserts that League Law 13 is protected by the proviso because the rule "literally involv[es] the acquisition and retention of membership." *Post*, at 121. This interpretation of the proviso would authorize *any* union restriction on the right to resign. The dissent does say that restrictions on resignation would not be permitted if they "furthered none of the purposes of collective action and self-organization." *Post*, at 132, n. 5. This limitation is illusory. An absolute restriction on resignations would enhance a union's collective-bargaining power, as would a rule that prohibited resignations during the life of the collective-bargaining agreement. In short, there is no limiting principle to the dissent's reading of the proviso.

to resign.[20] Rather, the Court has assumed that "rules with respect to the . . . retention of membership" are those that provide for the expulsion of employees from the union.[21] The legislative history of the Taft-Hartley Act is consistent with this interpretation. Senator Holland, the proviso's sponsor, stated that § 8(b)(1)(A) should not outlaw union rules "which ha[ve] to do with the admission *or the expulsion* of members." 93 Cong. Rec. 4271 (1947) (emphasis added). Senator Taft accepted the proviso, for he likewise believed that a union should be free to "refuse [a] man admission to the union, or *expel him from the union.*" *Id.*, at 4272 (emphasis added). Furthermore, the legislative history of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 401 *et seq.*, confirms that the proviso was intended to protect union rules involving admission and expulsion.[22]

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[20] JUSTICE BLACKMUN's dissent also interprets the proviso in a novel manner. He asserts that the only union rules prohibited by § 8(b)(1)(A) are those which "seek to coerce an employee by utilizing the employer's power over his employment status, or otherwise compel him to take on duties or join in concerted activities he never consented to." *Post*, at 120. This position is inconsistent with the Court's holding in *NLRB* v. *Marine & Shipbuilding Workers*, 391 U. S. 418 (1968). In that case, the Court held invalid a union rule requiring the "exhaust[ion of] all remedies and appeals within the Union . . . before . . . resort to any court or other tribunal outside of the Union." *Id.*, at 421. The rule was enforced by the imposition of fines, without "utilizing the employer's power over the violating members' employment status." Moreover, there was no suggestion that union members had not voluntarily agreed to be bound by the rule requiring exhaustion.

[21] In *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S., at 192, the Court assumed that the proviso authorized unions to expel members and to impose fines that carry the threat of expulsion.

[22] During the House debates on the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 401 *et seq.*, it was proposed that the pending bill be amended to prohibit unions from expelling members for discriminatory reasons. 105 Cong. Rec. 15721 (1959). The two sponsors of the bill, Representatives Landrum and Griffin, opposed this amendment on the ground that they did not seek to repeal the proviso to § 8(b)(1)(A). *Id.*, at 15722–15723. As this Court observed in *NLRB* v. *Drivers*, 362

Accordingly, we find no basis for refusing to defer to the Board's conclusion that League Law 13 is not a "rule with respect to the retention of membership," within the meaning of the proviso.

B

The petitioners next argue that the legislative history of the Taft-Hartley Act shows that Congress made a considered decision not to protect union members' right to resign. Section 8(c) of the House bill contained a detailed "bill of rights" for labor union members. H. R. 3020, § 8(c), 80th Cong., 1st Sess., 22–26 (1947). Included was a provision making it an unfair labor practice to "deny to any [union] member the right to resign from the organization at any time." H. R. 3020, *supra*, § 8(c)(4), at 23. The Senate bill, on the other hand, did not set forth specific employee rights, but stated more generally that it was an unfair labor practice to "restrain or coerce" employees in the exercise of their § 7 rights. H. R. 3020, 80th Cong., 1st Sess., § 8(b)(1)(A), p. 81 (1947) (as passed by Senate). The Taft-Hartley Act contains the Senate bill's general language rather than the more specific House prohibitions. See 29 U. S. C. § 158(b)(1)(A). The petitioners contend that the omission of the House provision shows that Congress expressly decided not to protect the "right to resign."

The legislative history does not support this contention. The "right to resign" apparently was included in the original House bill to protect workers unable to resign because of "closed shop" agreements. Union constitutions limiting the right to resign were uncommon in 1947, see n. 12, *supra;* closed shop agreements, however, often impeded union resignations. The House Report, H. R. Rep. No. 245, 80th Cong., 1st Sess. (1947), confirms that closed shop agreements provided the impetus for the inclusion of a right to resign in

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U. S. 274, 291 (1960): "[W]hat Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration."

the House bill. The Report simply states that even under the proposed legislation, employees could be required to pay dues pursuant to union security agreements. *Id.*, at 32. Because the closed shop was outlawed by the Taft-Hartley Act, see § 8(a)(3), 29 U. S. C. § 158(a)(3), it is not surprising that Congress thought it unnecessary explicitly to preserve the right to resign.

Even if § 8(c)(4) of the House bill, H. R. 3020, *supra*, was directed at restrictive union rules, its omission from the Taft-Hartley Act does not convince us that the Board's construction of § 8(b)(1)(A) is unreasonable. The House Conference Report, upon which petitioners primarily rely, does state that the specific prohibitions of § 8(c) were "omitted . . . as unfair labor practices," H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 46 (1947). But this language does not suggest that all employee rights arguably protected by the House bill were to be left unprotected. Cf. *id.*, at 43 ("[T]he primary strike for recognition . . . was not prohibited"). Apparently, the Report was intended merely to inform House Members that the detailed prohibitions of § 8(c) were not separately included in the conference bill as "unfair labor practices." We are reluctant to reach a contrary conclusion, and thereby overturn the Board's decision, on the basis of this summary statement in the House Conference Report. Congress must have been aware that the broad language of § 8(b)(1)(A) would reach some of the same union conduct proscribed by the detailed "bill of rights."[23]

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[23] Section 8(c)(9) of the House bill, H. R. 3020, 80th Cong., 1st Sess., 25, prohibited unions from "intimidat[ing a member's] family." Although this specific provision was omitted from the Taft-Hartley Act, it is unlikely that Congress intended to protect all union conduct that § 8(c)(9) would have proscribed. Union threats against the family of a member who crossed a picket line, for example, would seem to "restrain or coerce" him in the exercise of his § 7 rights.

The dissent by JUSTICE BLACKMUN suggests that because the Senate "explicitly has rejected" the specific prohibitions in § 8(c) of the House bill, see *post*, at 121, 122, the Taft-Hartley Act leaves unregulated the relation-

Petitioners concede that "absent the legislative history," the Board's construction of § 8(b)(1)(A) would be entitled to deference. Tr. of Second Oral Arg. 15 (Apr. 1985). They argue, however, that "in this instance the legislative materials are too clearly opposed to what the Board did to permit the result the Board reached." *Id.*, at 17. We do not agree. The ambiguous legislative history upon which petitioners rely falls far short of showing that the Board's interpretation of the Act is unreasonable.[24]

C

In *Textile Workers*, 409 U. S, at 216, and *Machinists*, 412 U. S., at 88 *(per curiam)*, the Court stated that when a union constitution does not purport to restrict the right to resign, the "law which normally is reflected in our free institutions" is applicable. Relying on this quoted language, petitioners

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ship between a union and its members. The legislative history shows, however, that the Senate did not intend such a result. Senator Taft stated that § 8(b)(1)(A) was designed to warn unions that "they do not have the right to interfere with or coerce employees, either *their own members* or those outside their union." 93 Cong. Rec. 4025 (1947) (emphasis added).

[24] *NLRB* v. *Drivers*, 362 U. S. 274 (1960), is not controlling. There the Court held that recognitional picketing did not "restrain or coerce" employees in violation of § 8(b)(1)(A), 29 U. S. C. § 158(b)(1)(A). In so concluding, the Court relied in part on the omission from the Taft-Hartley Act of two provisions in the original House bill explicitly banning recognitional picketing. Other evidence in that case, however, was highly probative of a congressional intent to protect recognitional picketing. The desirability of restrictions on peaceful picketing was widely debated in Congress. *Id.*, at 287–288. Moreover, the Conference Report stated that "'the primary strike for recogition . . . was not prohibited.'" *Id.*, at 289, quoting H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43 (1947). Finally, § 8(b)(4), as added by the Taft-Hartley Act, 29 U. S. C. § 158(b)(4), limits the use of other economic weapons (such as strikes and secondary boycotts) to compel recognition by an employer. See 362 U. S., at 282–284. It is clear that a compromise was reached by the 1947 Congress; recognitional picketing was to be allowed, while the use of other economic weapons to compel recognition was curtailed. There is no evidence of such a compromise with respect to the "right to resign."

argue that League Law 13 is valid. They assert that because the common law does not prohibit restrictions on resignation,[25] such provisions are not violative of § 8(b)(1)(A) of the Act. We find no merit in this argument. *Textile Workers*, *supra*, and *Machinists*, *supra*, held only that in the absence of restrictions on the right to resign, members are free to leave the union at any time. Although the Court noted that its decisions were consistent with the common-law rule, it did not state that the validity of restrictions on the right to resign should be determined with reference to common law.

The Court's decision in *NLRB* v. *Marine & Shipbuilding Workers*, 391 U. S. 418 (1968), demonstrates that many union rules, although valid under the common law of associations, run afoul of § 8(b)(1)(A) of the Act.[26] There the union ex-

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[25] It is at least open to question whether all restrictions on the right to resign are valid under the "common law of associations." See, *e. g.*, *Haynes* v. *Annandale Golf Club*, 4 Cal. 2d 28, 47 P. 2d 470 (1935) (a bylaw purporting to allow the association to deny a member's right of resignation by merely withholding its consent is invalid because unreasonable and arbitrary). Our conclusion that the common law is irrelevant makes it unnecessary to resolve this question.

[26] JUSTICE BLACKMUN's dissent suggests that the relationship between a union and its members should be governed by contract law. *Post*, at 119. The rationale of this theory is that a member, by joining the union, "enters into a contract, the terms of which are expressed in the union constitution and by-laws." Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1054 (1951). *Marine Workers* shows, of course, that union discipline cannot be analyzed primarily in terms of the common law of contracts.

The dissent repeatedly refers to the "promise" made by the employees involved in this case. *Post*, at 129. Because they were members of the union when League Law 13 was adopted, the dissent reasons that the employees "promised" not to resign during a strike. But the "promise" to which the dissent refers is unlike any other in traditional contract law. As a commentator has recognized:

"Membership in a union contemplates a continuing relationship with changing obligations as the union legislates in monthly meetings or in annual conventions. It creates a complex cluster of rights and duties

pelled a member who failed to comply with a rule requiring the "exhaust[ion of] all remedies and appeals within the Union . . . before . . . resort to any court or other tribunal outside of the Union." *Id.*, at 421. Under the common law, associations may require their members to exhaust all internal remedies. See, *e. g.*, *Medical Soc. of Mobile Cty.* v. *Walker*, 245 Ala. 135, 16 So. 2d 321 (1944). Nevertheless, the *Marine Workers* Court held that "considerations of public policy" mandated a holding that the union rule requiring exhaustion violated § 8(b)(1)(A), 29 U. S. C. § 158(b)(1)(A). 391 U. S., at 424; see also *Scofield* v. *NLRB*, 394 U. S., at 430 (union rule is invalid under § 8(b)(1)(A) if it "impairs [a] policy Congress has imbedded in the labor laws").

The Board reasonably has concluded that League Law 13 "restrains or coerces" employees, see § 8(b)(1)(A), and is inconsistent with the congressional policy of voluntary unionism. Therefore, whatever may have been the common law, the Board's interpretation of the Act merits our deference.

V

The Board has the primary responsibility for applying "'the general provisions of the Act to the complexities of industrial life.'" *Ford Motor Co.* v. *NLRB*, 441 U. S. 488, 496 (1979), quoting *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963), in turn citing *NLRB* v. *Steelworkers*, 357 U. S. 357, 362–363 (1958). Where the Board's construction of the Act is reasonable, it should not be rejected "merely because the courts might prefer another view of the statute." *Ford Motor Co.* v. *NLRB*, *supra*, at 497. In this case, two factors suggest that we should be particularly reluctant to hold that the Board's interpretation of the Act is impermissible.

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expressed in a constitution. In short, membership is a special relationship. It is as far removed from the main channel of contract law as the relationships created by marriage, the purchase of a stock certificate, or the hiring of a servant."

Summers, *supra*, at 1055–1056.

First, in related cases this Court invariably has yielded to Board decisions on whether fines imposed by a union "restrain or coerce" employees.[27] Second, the Board consistently has construed § 8(b)(1)(A) as prohibiting the imposition of fines on employees who have tendered resignations invalid under a union constitution.[28] Therefore, we conclude that the Board's decision here is entitled to our deference.

VI

The Board found that by fining employees who had tendered resignations, the petitioners violated § 8(b)(1)(A) of the

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[27] In holding that unions may impose fines against members who return to work during a strike, the Court in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), "essentially accepted the position of the National Labor Relations Board." *Scofield* v. *NLRB*, 394 U. S. 423, 428 (1969). In *Scofield*, the Court deferred to the Board's ruling that § 8(b)(1)(A) does not prohibit unions from fining members who accept daily wages in excess of a union-imposed ceiling. Four years later, the Court again relied on the Board in holding that § 8(b)(1)(A) has nothing to say about whether union fines are "reasonable" in amount. *NLRB* v. *Boeing Co.*, 412 U. S. 67 (1973). Finally, in *NLRB* v. *Textile Workers*, 409 U. S. 213 (1972), and *Machinists* v. *NLRB*, 412 U. S. 84 (1973) *(per curiam)*, the Court deferred to the Board's conclusion that § 8(b)(1)(A) prohibits unions from fining former members who have resigned lawfully.

[28] In *United Automobile, Aerospace & Agricultural Implement Workers, Local 647 (General Electric Co.)*, 197 N. L. R. B. 608 (1972), the Board held that § 8(b)(1)(A) prohibits a union from fining employees who have resigned, even when a provision in the union constitution purports to make the resignations invalid. There two employees resigned during a strike and returned to work. Their resignations were ineffective under a union constitutional provision permitting resignations only during the last 10 days of the union's fiscal year. The Board nevertheless held that the employees could not be fined for crossing the picket line. It noted that imposing fines on these employees was inconsistent with *Scofield* v. *NLRB*, *supra*, for they effectively were denied "a voluntary method of severing their relationship with the Union." 197 N. L. R. B., at 609. The Board reached the same conclusion in *United Automobile, Aerospace & Agricultural Implement Workers, Local 469 (Master Lock Co.)*, 221 N. L. R. B. 748 (1975). See also *Local 1384, United Automobile, Aerospace & Agricultural Implement Workers (Ex-Cell-O Corp.)*, 219 N. L. R. B. 729 (1975).

Act, even though League Law 13 purported to render the resignations ineffective. We defer to the Board's interpretation of the Act and so affirm the judgment of the Court of Appeals enforcing the Board's order.

It is so ordered.

JUSTICE WHITE, concurring.

I agree with the Court that the Board's construction of §§ 7 and 8(b)(1)(A) is a permissible one and should be upheld. The employee's rights under § 7 include, among others, the right to refrain from joining or assisting a labor organization and from engaging in concerted activities for mutual aid or protection. The right to join or not to join a labor union includes the right to resign, and § 8(b)(1)(A) forbids unions to interfere with that right except to the extent, if any, that such interference is permitted by the proviso to that section, which preserves the union's right to prescribe its own rules with respect to the acquisition or retention of membership. The proviso might be read as permitting restrictions on resignation during a strike, since they would seem to relate to the "retention" of membership. But it can also be sensibly read to refer only to the union's right to determine who shall be allowed to join and to remain in the union. The latter is the Board's interpretation. Under that view, restrictions on resignations are not saved by the proviso, and the rule at issue in this case may not be enforced.

For the Act to be administered with the necessary flexibility and responsiveness to "the actualities of industrial relations," *NLRB* v. *Steelworkers*, 357 U. S. 357, 362–364 (1958), the primary responsibility for construing its general provisions must be with the Board, and that is where Congress has placed it. "[W]e should 'recognize without hesitation the primary function and responsibility of the Board'" to apply these provisions to particular, and often complex, situations. *Ford Motor Co.* v. *NLRB*, 441 U. S. 488, 496 (1979), quoting *NLRB* v. *Insurance Agents*, 361 U. S. 477, 499 (1960).

Where the statutory language is rationally susceptible to contrary readings, and the search for congressional intent is unenlightening, deference to the Board is not only appropriate, but necessary.

This is such a case. The Board has adopted a sensible construction of the imprecise language of §§ 7 and 8 that is not negated by the legislative history of the Act. That Congress eliminated from the bill under consideration a provision that would have made certain restrictions on resignation unfair labor practices falls short of indicating an intention to foreclose the Board's reading. By the same token, however, there is nothing in the legislative history to indicate that the Board's interpretation is the only acceptable construction of the Act, and the relevant sections are also susceptible to the construction urged by the union in this case. Therefore, were the Board arguing for that interpretation of the Act, I would accord its view appropriate deference.

Because I do not understand it to be inconsistent with the foregoing views, I join the Court's opinion.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Today the Court supinely defers to a divided-vote determination by the National Labor Relations Board that a union commits an unfair labor practice when it enforces a worker's promise to his fellow workers not to resign from his union and return to work during a strike, even though the worker freely made the decision to join the union and freely made the promise not to resign at such a time, and even though union members democratically made the decision to strike in full awareness of that promise. The Court appears to adopt the NLRB's rule that enforcement of any such promise, no matter how limited and no matter how reasonable, violates the breaching worker's right to refrain from concerted activity. The Board's rule, however, finds no support in either the lan-

guage of §§ 7 and 8(b)(1)(A) of the National Labor Relations Act on which the Court purports to rely, or in the general goals of the Act, which it ignores. Accordingly, the undeserved deference accorded that rule has produced a holding that improperly restricts a union's federally protected right to make and enforce its own rules, and at the same time traduces the broader aim of federal labor policy implicated by this right: to preserve the balance of power between labor and management by guaranteeing workers an effective right to strike.

I

A

Having determined that the individual worker standing alone lacked sufficient bargaining power to achieve a fair agreement with his employer over the terms and conditions of his employment, Congress passed the NLRA in order to protect employees' rights to join together and act collectively. See 29 U. S. C. § 151. Thus, the heart of the Act is the protection of workers' § 7 rights to self-organization and to free collective bargaining, which are in turn protected by § 8 of the Act. 29 U. S. C. §§ 157 and 158.

Because the employees' power protected in the NLRA is the power to act collectively, it has long been settled that the collective has a right to promulgate rules binding on its members, so long as the employee's decision to become a member is a voluntary one and the rules are democratically adopted. When these requirements of free association are met, the union has the right to enforce such rules "through reasonable discipline," including fines. See *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 181 (1967). Unless internal rules can be enforced, the union's status as bargaining representative will be eroded, and the rights of the members to act collectively will be jeopardized. *Ibid.* "Union activity, by its very nature, is group activity, and is grounded on the notion that strength can be garnered from unity, solidar-

ity, and mutual commitment. This concept is of particular force during a strike, where the individual members of the union draw strength from the commitments of fellow members, and where the activities carried on by the union rest fundamentally on the mutual reliance that inheres in the 'pact.'" *NLRB* v. *Textile Workers*, 409 U. S. 213, 221 (1972) (dissenting opinion); see *Allis-Chalmers*, 388 U. S., at 181.

It is in the proviso to § 8(b)(1)(A), 29 U. S. C. § 158(b)(1)(A), that Congress preserved for the union the right to establish "the contractual relationship between union and member." *Textile Workers*, 409 U. S., at 217. Recognizing "the law which normally is reflected in our free institutions," *id.*, at 216, Congress in the proviso preserved a union's status as a voluntary association free to define its own membership. The proviso states that the creation of a union unfair labor practice for a violation of the workers' right to refrain from collective action does not "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U. S. C. § 158(b)(1)(A). As the Court has recognized previously and now concedes, the legislative history indicates that the proviso was meant to ensure that the employees' "right to refrain" would not be understood "to interfere with the internal affairs or organization of unions." *Ante*, at 102, quoting *Allis-Chalmers*, 388 U. S., at 187, in turn quoting 93 Cong. Rec. 4272 (1947) (statement of Sen. Ball). The "right to refrain" simply "was not intended to give the Board power to regulate internal union affairs, including the imposition of disciplinary fines, with their consequent court enforcement, against members who violate the unions' constitutions and bylaws." *NLRB* v. *Boeing Co.*, 412 U. S. 67, 71 (1973). See also *Scofield* v. *NLRB*, 394 U. S. 423, 428 (1969).

Sensitive to both the Act's central goal of facilitating collective action, and the Taft-Hartley Act's protection against coercion of employees, the Court previously has interpreted the proviso to distinguish between two kinds of union rules.

Reasonable union rules that represent obligations voluntarily incurred by members were intended to be free from federal regulation under § 8, while union rules that seek to coerce an employee by utilizing the employer's power over his employment status, or otherwise compel him to take on duties or join in concerted activities he never consented to, were intended to be subject to regulation by the Board. Because rules that regulate the relationship between the union and his employer could be used to coerce an employee into becoming involved with the union in order to protect his job, such rules would impair the employee's free association rights. "[T]he repeated refrain throughout the debates on § 8(b)(1)(A) and other sections [was] that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." *Allis-Chalmers*, 388 U. S., at 195. The proviso was designed "to make it clear that . . . [a]ll we are trying to cover [in § 8] is the coercive and restraining acts of the union in its efforts to organize unorganized employees." 93 Cong. Rec. 4433 (1947) (statement of Sen. Ball). Until today, the Court has rejected the proposition that the proviso does not protect a union rule merely because the rule has an impact beyond the confines of the labor organization, *Scofield*, 394 U. S., at 431–432, or because it is not a rule about the expulsion of members. Cf. *ante*, at 108–110.

League Law 13 is an internal union rule, a "rule with respect to the acquisition or retention of membership" protected by the proviso to § 8(b)(1)(A). It requires that employees who freely choose to join the union promise to remain members during a strike or lockout, as well as during the time when a strike or lockout appears imminent. In other words, the rule imposes a condition upon members of the bargaining unit who would like to acquire membership rights. The rule stands for the proposition that to become a union member one must be willing to incur a certain obligation upon

which others may rely; as such, it is a rule literally involving the acquisition and retention of membership. Conversely, League Law 13 does not in any way affect the relationship between the employee and the employer. An employee who violates the rule does not risk losing his job, and the union cannot seek an employer's coercive assistance in collecting any fine that is imposed. The rule neither coerces a worker to become a union member against his will, nor affects an employee's status as an employee under the Act. Thus, it clearly falls within the powers of any voluntary association to enact and enforce "the requirements and standards of membership in the union itself," so as to permit the association effectively to pursue collective goals. 93 Cong. Rec. 4433 (1947) (remarks of Sen. Ball).

B

The Court nonetheless finds that League Law 13 violates an employee's right to refrain from collective activity and is not protected by the proviso. It reaches this conclusion by giving the proviso a cramped reading as a provision protecting only rules concerning the expulsion of members, see *ante*, at 108–110, ignoring in the process both the plain meaning and the legislative history of the proviso. Further, the Court never addresses the fact that the rule is a prerequisite of union membership much like any other internal union rule. Indeed, the Court entirely fails to explain why League Law 13 is *not* a rule "with respect to the acquisition or retention of membership," even given its own enervating understanding of the proviso. The rule, after all, is one to which a member was obliged to agree when he acquired or decided to retain membership in the union.

Moreover, Congress explicitly has rejected the Court's interpretation of §§ 7 and 8(b)(1)(A). The "right to refrain" language upon which the Court relies was contained in § 7(a) of the House version of the Act, H. R. 3020, 80th Cong., 1st Sess. (1947) (House bill). Section 7 of the House bill was

divided into subsection (a), granting "employees" the right to refrain from concerted activity, and subsection (b), granting "[m]embers of any labor organization" rights concerning the "affairs of the organization." Corresponding to these provisions were § 8(b), which made it an unfair labor practice for anyone to interfere with an employee's § 7(a) rights, and § 8(c), which made it an unfair labor practice to interfere with an employee's § 7(b) rights. In particular, § 8(c) created a bill of rights for union members in their dealings with their union, establishing 10 unfair labor practices which regulated the major facets of the member-union relationship. Among these specifically enumerated rights was § 8(c)(4), which made it an unfair labor practice "to deny to any member the right to resign from the organization at any time."

Thus, the House regarded the "right to refrain" of § 7(a) as the right not to join in union activity, making it illegal for "representatives and their partisans and adherents to harass or abuse employees into joining labor organizations." H. R. Rep. No. 245, 80th Cong., 1st Sess., 30 (1947). And the House believed that § 7(b) and § 8(c) of its bill, which included a proscription of internal rules concerning a member's right to resign, regulated the member-union relationship. There is no suggestion that the House considered the right to refrain to include the right to abandon an agreed-upon undertaking at will, nor to relate to the rights against the union protected by §§ 7(b) and 8(c) of the House bill, including the right to resign at will. Rather, these distinct rights arose from separate sections of the House bill.

It is critical to an understanding of the Taft-Hartley bill, therefore, to recognize that the Senate explicitly *rejected* the House bill's §§ 7(b) and 8(c). It did so not, as the Court intimates, because it considered the specific provisions of §§ 7(b) and 8(c) to encompass the "right to refrain" language adopted from § 7(a), but because it decided that "the formulation of a code of rights for individual members of trade unions . . . should receive more extended study by a special joint con-

gressional committee." S. Rep. No. 105, 80th Cong., 1st Sess., 2 (1947). Senator Taft's summary of the bill provides a clear and nonmysterious explanation of the Senate's stance on regulation of the union-member relationship:

> "In the House bill union initiation fees were among 10 provisions providing for certain rights and immunities of members of labor organizations against arbitrary action by the officers of a union to which they belonged. This was the so-called bill of rights subsection in the House bill. The Senate conferees refused to agree to the inclusion of this subsection in the conference agreement since they felt that it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions as this section contemplated without further study of the structure of unions." 93 Cong. Rec. 6443 (1947).

And the House Conference Report, though reflecting the understatement of the vanquished, is equally clear:

> "Section 8(c) of the House bill contained detailed provisions dealing with the relations of labor organizations with their members. One of the more important provisions of this section—[involving initiation fees in union shops]—is included in the conference agreement . . . and has already been discussed. The other parts of this subsection are omitted from the conference agreement as unfair labor practices. . . ." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 46 (1947).

In the face of this substantial legislative history indicating that the House provisions were rejected on the merits, the Court's treatment of that history, see *ante*, at 111, is both inaccurate and inadequate.[1]

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[1] Moreover, any claim that the language of § 8(b)(1)(A) as enacted is broad enough to allow the Board to find in it a prohibition on union rules governing the right to resign ignores the fact that the Senate also rejected

Not surprisingly, the Court reaches for an alternative explanation as to why the "right to resign" provision was omitted from the Taft-Hartley amendments. We are told that the "right to resign" provision was omitted from the bill because the House, having won a provision making the closed shop illegal, was willing to give in on the right to resign. *Ante*, at 110–111. If this indeed explains the House's actions, its concession merely reinforces what the rest of the legislative history makes explicit: that the Senate was willing to agree to proscribe the closed shop and union shop because it agreed that they improperly coerced an employee into becoming a union member in order to keep his job. But the Senate was not willing to impose conditions on the contractual relationship between the union and its members, including a rule giving members a right to resign at will, insofar as such regulation did not affect the employment relationship. The House may have thought that the closed shop rules and the rules regulating the internal affairs of unions were similar rules aimed at preventing a union from limiting the freedom of choice of employees in what it considered impermissible ways. Drawing a different distinction, the Senate less narrowly circumscribed union discretion: rules that coerced an employee into taking collective action against his will by threatening his employment rights were prohibited, while rules that were a prerequisite of acquisition or retention of membership were to be left unregulated for the time being. Perhaps the House believed that the proscription against the closed shop and the proscription on limitations on a member's right to resign were aimed at the same evil. But the Senate obviously did not, and it prevailed.

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the House's broader version of *that* section that at least would have lent some support for that assertion. In particular, the Senate rejected the House's proscription on union efforts "by intimidating practices . . . to compel or seek to compel any individual to become *or remain* a member of any labor organization." See H. R. 3020, 80th Cong., 1st Sess., § 8(b)(1) (1947) (emphasis added).

The Court thus faces the same situation it addressed when it rejected the Board's interpretation of the recognitional-picketing provisions of the Act in *NLRB* v. *Drivers*, 362 U. S. 274 (1960) *(Curtis Bros.)*. "Plainly, the [union's] conduct in the instant case would have been prohibited if the House bill had become law. . . . But the House conferees abandoned the House bill in conference and accepted the Senate proposal." *Id.*, at 289. As in *Curtis Bros.*, it is therefore appropriate to recall that

> "'the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation. . . . This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law.'" *Id.*, at 289–290, quoting *Carpenters* v. *NLRB*, 357 U. S. 93, 99–100 (1958).

Here, too, the legislative history "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 200 (1974).[2]

The Court also attempts to justify its result by suggesting that League Law 13 impairs a federal labor policy mandating "voluntary unionism" implicit in § 8(a)(3) of the Act, and thus

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[2] The Court finds *Curtis Bros.* not controlling because there was evidence in that case that a compromise had been reached between the House and the Senate as regards restrictions on peaceful picketing. See *ante*, at 112, n. 24. Today the Court finds "no evidence of such a compromise with respect to the 'right to resign.'" *Ibid.* The Court is correct: there was no compromise because the Conference rejected entirely the House's attempt to regulate internal union affairs in the Taft-Hartley Act. I am not persuaded that it is more acceptable for the Court to adopt a rule entirely rejected by Congress than to adopt one that was rejected as part of a compromise.

is unenforceable under § 8(a)(1) of the Act. See *ante*, at 104, quoting *Scofield*, 394 U. S., at 430. Thus, the Court says, for the same reason that Congress determined that the closed shop should be prohibited as a violation of an employee's right to refrain from concerted activity, a promise not to leave the union during a strike should not be enforceable. Both rules, the Court intimates, "protec[t] the employment rights of the dissatisfied member." *Ante*, at 106.

The Court, however, again ignores the distinction between internal and external rules fashioned in its prior cases, and so misunderstands the concept of "voluntary unionism" implicated by the Act. The purpose of the union unfair labor practice provisions added to § 8(a)(3) was to "preven[t] the union from inducing the employer to use the emoluments of the job to enforce the union's rules." *Scofield*, 394 U. S., at 429. By outlawing the closed shop and the union shop Congress ensured that a union's disciplinary rules can have no effect on the employment rights of the member, and so cannot impinge upon the policy of voluntary unionism protected by § 8(a)(3) of the Act.

The proviso serves a fundamentally different purpose—to make manifest that § 8 did not grant the Board the authority to impair the basic right of all membership associations to establish their own reasonable membership rules. League Law 13 is such a rule. It binds members to a reciprocal promise not to resign and return to work during a strike. It does not involve use of the employer's power or affect an individual's employment status, and so does not implicate § 8(a)(3). A member who violates the union rule may be fined, or even expelled from the union, but his employment status remains unaffected. Despite the Court's suggestions to the contrary, "voluntary unionism" does not require that an employee who has freely chosen to join a union and retain his membership therein, in full knowledge that by those decisions he has accepted specified obligations to other members, nevertheless has a federally protected right to disre-

gard those obligations at will, regardless of the acts of others taken in reliance on them.[3]

At bottom, the Court relies on an unspoken concept of voluntary unionism that, carried to its extreme, would deny to the union member—in the name of having his participation in the union be voluntary—the right to make any meaningful promise to his co-workers. The Court understands voluntariness to mean freedom from enforceable commitment, treating the union member as a juvenile or incompetent whose promise may not be enforced against him because it is presumed not to have been made with awareness of the consequences of the promise. Not only is the Court's paternalism misplaced and offensive to the member, but it threatens the power to act collectively that is at the center of the Act.

II

Congress' decision not to intervene in the internal affairs of a union reflects Congress' understanding that membership in a union—if not a precondition for one's right to employment—is a freely chosen membership in a voluntary association. The Court therefore has looked to "the law which

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[3] The Court's response is that a right to fine a member is an infringement on a worker's employment rights. It reasons, apparently, that because workers work for money and fines are exacted in the same currency, a fine permits a union to take away what the worker gains in employment. See *ante*, at 106–107. This, of course, is to say that *any* fine imposed for a violation of an internal union rule violates a member's employment rights, a proposition explicitly rejected in both *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), and *Scofield* v. *NLRB*, 394 U. S. 423 (1969). The Court's reasoning is obviously circular: enforcement of a union rule prohibiting resignation during a strike is different from enforcement of other union rules because it violates policies of voluntary unionism. It violates those policies because it works an infringement on employment rights. It works an infringement on employment rights because it imposes fines. And these fines are impermissible while fines for violation of other union rules are appropriate because—the rule here violates voluntary unionism.

normally is reflected in our free institutions" to determine whether any given membership rule is lawful. *NLRB* v. *Textile Workers*, 409 U. S., at 216. And the common law of associations establishes that an association may place reasonable restrictions on its members' right to resign where such restrictions are designed to further a basic purpose for which the association was formed[4]—here, where the restriction "reflects a legitimate union interest." *Scofield*, 394 U. S., at 430. The Pattern Makers evidently promulgated League Law 13 to protect the common interest in maintaining a united front during an economic strike. Such a rule protects individual union members' decisions to place their own and their families' welfare at risk in reliance on the reciprocal decisions of their fellow workers, and furthers the union's ability to bargain with the employer on equal terms, as envisioned by the Act. As such, the rule comports with the broader goals of federal labor policy, which guarantees workers the right to collective action and, in particular, the right to strike.

Specifically, Congress has mandated that nothing in the Act, including the "right to refrain" relied upon by the Court today, "shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U. S. C. § 163. The strike or the threat to strike is the workers' most effective means of pressuring employers, and so lies at the center of the collective activity protected by the Act. "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms." *Allis-Chalmers*, 388 U. S., at 181. Consequently, the Court

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[4] See, *e. g.*, *Troy Iron and Nail Factory* v. *Corning*, 45 Barb. 231, 256–257 (N. Y. Sup. Ct. 1864); *Leon* v. *Chrysler Motors Corp.*, 358 F. Supp. 877, 886–888 (NJ 1973), affirmance order, 474 F. 2d 1340 (CA3 1974). See also Note, A Union's Right to Control Strike-Period Resignations, 85 Colum. L. Rev. 339, 354–355, and nn. 107–110 (1985) (Columbia Note).

has recognized that "'[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent.'" *Ibid.*, quoting Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951).

To be effective, the decision to strike, like the decision to bargain collectively, must be respected by the minority until democratically revoked. The employees' collective decision to strike is not taken lightly, and entails considerable costs. See *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 345 (1938) (employer has right permanently to replace workers on economic strike). Before workers undertake such a course, it is reasonable that they have some assurance that collectively they will have the means to withstand the pressures the employer is able lawfully to impose on them. A voluntarily and democratically adopted rule prohibiting resignations during a strike is one such means. By ensuring solidarity during a strike, it enforces the union's "legitimate interest in presenting a united front . . . and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests." *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U. S. 50, 70 (1975).

Once an employee freely has made the decision to become a member of the union, has agreed not to resign during a strike, and has had the opportunity to participate in the decision to strike, his faithfulness to his promise is simply the *quid pro quo* for the benefits he has received as a result of his decision to band together with his fellow workers and to join in collective bargaining. For the dissatisfied member to return to work in violation of his promise, while his fellows remain on strike—forgoing their wages and risking their jobs in a now-weakened effort to pressure the employer into making concessions—is to allow the breaching individual to become a free rider, enjoying the benefits of his bargain without having to live with the risks that all who sought those benefits agreed to share.

More perniciously, a dissenting individual's decision to return to work predictably could have a snowballing effect, as apparently it did in this case, causing the strike to lose its effectiveness even though the majority of workers, having commenced collective action in reliance on a now-breached promise of solidarity, would wish to continue that action. It is hardly inconsistent with federal labor policy to enact a rule to ensure that the collective decision to remain out on strike be revocable only by procedures agreed upon collectively, not by the decision of a few dissenting individuals who believe it is in their individual interests to return to work, breaking the promise they made to abide by the majority's will. In a strike setting, therefore, "[t]he mutual reliance of his fellow members who abide by the strike for which they have all voted outweighs . . . the admitted interests of the individual who resigns to return to work." *NLRB* v. *Textile Workers*, 409 U. S., at 223 (dissenting opinion).

Enforcement of a promise not to resign during a strike, then, is not a limitation of a § 7 right, but is a vindication of that right to act collectively and engage in collective bargaining, so long as the promise is voluntarily made. It is a way to effectuate "'[t]he majority-rule concept [that] is today unquestionably at the center of our federal labor policy.'" *Allis-Chalmers*, 388 U. S., at 180, quoting Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327, 1333 (1958). As such, League Law 13 is a condition on union membership that a union might reasonably impose to advance its legitimate ends, and so is an internal union rule protected by the proviso preserving a union's right to enact reasonable rules defining the conditions of union membership.

III

In sum, the Court defers to the Board although the Board's position cannot fairly be said to rest on any principled application of the policies of our national labor laws. Because

a majority of the Board has interpreted the terms of the NLRA in a manner inconsistent with the congressional purpose clearly expressed in the legislative scheme and amply documented in the legislative history, the Court's deference is misplaced. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965). We are not here "to stand aside and rubber-stamp . . . administrative decisions that [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB* v. *Brown*, 380 U. S. 278, 291–292 (1965). See also *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 166 (1971); 5 U. S. C. §§ 706(2)(A) and (C).

IV

The Court previously has recognized that it violates precepts of voluntary unionism to bind a member to promises he did not knowingly make. See *Machinists* v. *NLRB*, 412 U. S. 84, 89 (1973). The Board therefore properly could prevent enforcement of a rule like League Law 13 if there were evidence that the members were not aware of the provision until they had lost the ability to escape its force. *Id.*, at 91 (opinion concurring in judgment). Though the § 7 right not to participate may be waived, as it was here, see *Metropolitan Edison Co.* v. *NLRB*, 460 U. S. 693, 705 (1983); *Allis-Chalmers*, 388 U. S., at 180; *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 280 (1956), a waiver "must be clear and unmistakable." *Metropolitan Edison Co.* v. *NLRB*, *supra*, at 708. The Court for that reason has agreed with the Board that it is an unfair labor practice for a union to attempt to collect a fine against a member who resigned from the union during a strike when it was not made explicit to the member that as a condition of membership he had to agree

not to resign during the strike. See *Machinists* v. *NLRB*, *supra*.[5]

There is no similar suggestion in the record before us that the union members here were unaware of the promises they had made to their fellow members. If the dissenting members disagreed either with the decision to enact League Law 13, or with the decision to strike, they were free to try to influence their colleagues to their view. If they did not agree with the enactment of League Law 13, they were free as well to resign from the union when the rule was promulgated over their objection. Once the strike had begun, if they believed that the union officers were no longer acting in their best interest, they were free to try to convince their colleagues to end the strike, to replace their leaders, or even to decertify their union. See *Allis-Chalmers*, 388 U. S., at 191. Having failed to persuade the majority to their view, they should not be free to break their promise to their fellow workers.

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[5] See Gould, Solidarity Forever—Or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign, 66 Cornell L. Rev. 74, 106–114 (1980); Columbia Note 366–367.

The principle that free associations may make rules to further the ends of the association, guaranteed to unions in the proviso, does not necessarily protect any kind of internal union rule that implicates a worker's right to refrain from collective action. For example, a union rule that impinged on a member's right to refrain from collective activity but furthered none of the purposes of collective action and self-organization protected by the labor law would not fit comfortably within the proviso. See *id.*, at 367–369; cf. *Local 1384, UAW*, 227 N. L. R. B. 1045 (1977) (rule allowing members to resign in a 10-day period once a year illegitimate because it does not vindicate any legitimate union interest). Thus in *NLRB* v. *Marine Workers*, 391 U. S. 418 (1968), the Court held invalid an internal union rule that denied members access to the NLRB because the rule violated policies of speedy access to the Board implicated by § 10(b) of the Act, 29 U. S. C. § 160(b), and attempted to further policies "beyond the legitimate interests of a labor organization." 391 U. S., at 424. The Court today inconsistently labels this standard "illusory," *ante*, at 108, n. 19, and then inaccurately chastises the dissent for not following it. *Ante*, at 109, n. 20.

"[T]he principle of fidelity to one's word is an ancient one." C. Fried, Contract As Promise 2 (1981). The assumption that one's freedom has been limited by being held to one's freely made bargain is as misguided in the context of the labor law as when stated as a general principle. By focusing exclusively on the right to refrain from collective action, by assuming an arid and artificial conception of the proviso circumscribing that right, and by ignoring Congress' intentions in promulgating the NLRA in the first instance, the Board and the Court abandon their proper role as mediators between any conflicting interests protected by the labor laws. In the name of protecting individual workers' rights to violate their contractual agreements, the Court debilitates the right of all workers to take effective collective action. The conclusion that freedom under the NLRA means freedom to break a freely made promise to one's fellow workers after they have relied on that promise to their detriment is not only a notion at odds with the structure and purpose of our labor law, but is an affront to the autonomy of the American worker. I dissent.

JUSTICE STEVENS, dissenting.

The legislative history of the Labor-Management Relations Act, 1947, discussed in Part I–B of JUSTICE BLACKMUN'S dissenting opinion, coupled with the plain language in the proviso to § 8(b)(1)(A), persuades me that the "right to refrain" protected by § 7 of the Act does not encompass the "right to resign." Accordingly, I respectfully dissent.

MASSACHUSETTS MUTUAL LIFE INSURANCE CO. ET AL. *v.* RUSSELL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-9. Argued January 16, 1985—Reargued April 24, 1985—Decided June 27, 1985

Respondent, a claims examiner for petitioner insurance company (petitioner), is a beneficiary under employee benefit plans administered by petitioner and governed by the Employee Retirement Income Security Act of 1974 (ERISA). In May 1979, respondent became disabled with a back ailment, and received plan benefits until October 17, 1979, when petitioner's disability committee terminated her benefits based on an orthopedic surgeon's report. Respondent then requested review of that decision, and on March 11, 1980, the plan administrator reinstated her benefits based on further medical reports, and retroactive benefits were paid in full. But claiming that she had been injured by the improper refusal to pay benefits from October 17, 1979, to March 11, 1980, respondent sued petitioner in California Superior Court, alleging various causes of action based on state law and on ERISA. Petitioner removed the case to Federal District Court, which granted petitioner's motion for summary judgment, holding, *inter alia*, that ERISA barred any claims for extracontractual damages arising out of the original denial of respondent's claim for benefits. The Court of Appeals reversed in pertinent part, holding that the 132 days that petitioner took to process respondent's claim violated the plan fiduciary's obligation to process claims in good faith and in a fair and diligent manner, and that this violation gave rise to a cause of action for damages under § 409(a) of ERISA that could be asserted by a plan beneficiary pursuant to § 502(a)(2) authorizing civil enforcement of ERISA. Section 409(a) provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

Held: Section 409(a) does not provide a cause of action for extracontractual damages to a beneficiary caused by improper or untimely processing of benefit claims. Pp. 139–148.

(a) The text of § 409(a) contains no express authority for an award of such damages, and there is nothing in the text to support the conclusion that a delay in processing a disputed claim gives rise to a private cause of action for compensatory or punitive relief. Rather, the text shows that Congress did not intend to authorize any relief except for the plan itself. Not only is the relevant fiduciary relationship characterized at the outset of § 409(a) as one "with respect to a plan," but the fiduciary's potential personal liability is "to make good *to such plan* any losses *to the plan* . . . and to restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan*." Pp. 139–144.

(b) Nor can a private cause of action for extra-contractual damages be implied. While respondent is a member of the class for whose benefit ERISA was enacted and, in view of the pre-emptive effect of ERISA, there is no state-law impediment to implying a remedy, legislative intent and consistency with the legislative scheme support the conclusion that Congress did not intend the judiciary to imply such a cause of action. The civil enforcement provisions of § 502(a) provide strong evidence that Congress did *not* intend to authorize other remedies that it did not incorporate expressly. Pp. 145–148.

722 F. 2d 482, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 148.

John E. Nolan, Jr., reargued the cause for petitioners. With him on the briefs were *Paul J. Ondrasik, Jr.*, *Antonia B. Ianniello*, *Richard T. Davis, Jr.*, and *David L. Bacon*.

Brad N. Baker reargued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the Alaska Fishermen's Union-Salmon Canners Pension Trust et al. by *Thomas J. Hart* and *Richard P. Donaldson;* for the American Council of Life Insurance and Health Insurance Association of America by *Erwin N. Griswold*, *Jack H. Blaine*, and *Edward J. Zimmerman;* for the Board of Trustees of the Northern California Carpenters Trust Funds et al. by *Thomas E. Stanton* and *Donald S. Tayer;* for the Motion Picture Health and Welfare Fund by *William L. Cole;* for the Pipe Trust et al. by *Stuart H. Young, Jr.;* for the Construction Laborers Pension Trust for Southern California et al. by *James P. Watson*, *George M. Cox*, *John S. Miller, Jr.*, and *Lionel Richman*.

Carl B. Frankel and *Bernard Kleiman* filed a brief for the United Steelworkers of America, AFL–CIO: CLC, as *amicus curiae* urging affirmance.

JUSTICE STEVENS delivered the opinion of the Court.

The question presented for decision is whether, under the Employee Retirement Income Security Act of 1974 (ERISA), a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for extracontractual compensatory or punitive damages caused by improper or untimely processing of benefit claims.

Respondent Doris Russell, a claims examiner for petitioner Massachusetts Mutual Life Insurance Company (hereafter petitioner), is a beneficiary under two employee benefit plans administered by petitioner for eligible employees. Both plans are funded from the general assets of petitioner and both are governed by ERISA.

In May 1979 respondent became disabled with a back ailment. She received plan benefits until October 17, 1979, when, based on the report of an orthopedic surgeon, petitioner's disability committee terminated her benefits. On October 22, 1979, she requested internal review of that decision and, on November 27, 1979, submitted a report from her own psychiatrist indicating that she suffered from a psychosomatic disability with physical manifestations rather than an orthopedic illness. After an examination by a second psychiatrist on February 15, 1980, had confirmed that respondent was temporarily disabled, the plan administrator reinstated her benefits on March 11, 1980. Two days later retroactive benefits were paid in full.[1]

Although respondent has been paid all benefits to which she is contractually entitled, she claims to have been injured by the improper refusal to pay benefits from October 17, 1979, when her benefits were terminated, to March 11, 1980, when her eligibility was restored. Among other allegations, she asserts that the fiduciaries administering petitioner's employee benefit plans are high-ranking company officials who

[1] Respondent later qualified for permanent disability benefits which have been regularly paid.

(1) ignored readily available medical evidence documenting respondent's disability, (2) applied unwarrantedly strict eligibility standards, and (3) deliberately took 132 days to process her claim, in violation of regulations promulgated by the Secretary of Labor.[2] The interruption of benefit payments allegedly forced respondent's disabled husband to cash out his retirement savings which, in turn, aggravated the psychological condition that caused respondent's back ailment. Accordingly, she sued petitioner in the California Superior Court pleading various causes of action based on state law and on ERISA.

Petitioner removed the case to the United States District Court for the Central District of California and moved for summary judgment. The District Court granted the motion, holding that the state-law claims were pre-empted by ERISA and that "ERISA bars any claims for extra-contractual damages and punitive damages arising out of the original denial of plaintiff's claims for benefits under the Salary Continuance Plan and the subsequent review thereof." App. to Pet. for Cert. 29a.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. 722 F. 2d 482 (1983). Although it agreed with the District Court that respondent's state-law causes of action were pre-empted by ERISA, it held that her complaint alleged a cause of action under ERISA. See *id.*, at 487–492. The court reasoned that the 132 days[3] petitioner took to process respondent's claim violated the fiduciary's obligation to process claims in good faith and in a fair and diligent manner. *Id.*, at

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[2] The regulations, which are authorized by §§ 503, 505, 88 Stat. 893–894, 29 U. S. C. §§ 1133, 1135, appear at 29 CFR § 2560.503–1(h) (1984). We discuss them *infra*, at 144, and n. 11.

[3] Petitioner argues that the review period should be measured from November 27, 1979, when respondent submitted her medical evidence, rather than from October 22, 1979, the date she requested review, but for purposes of our decision we accept respondent's position on this point.

488. The court concluded that this violation gave rise to a cause of action under § 409(a) that could be asserted by a plan beneficiary pursuant to § 502(a)(2). *Id.*, at 489–490. It read the authorization in § 409(a) of "such other equitable or remedial relief as the court may deem appropriate" as giving it "wide discretion as to the damages to be awarded," including compensatory and punitive damages. *Id.*, at 490–491.

According to the Court of Appeals, the award of compensatory damages shall "remedy the wrong and make the aggrieved individual whole," which meant not merely contractual damages for loss of plan benefits, but relief "that will compensate the injured party for all losses and injuries sustained as a direct and proximate cause of the breach of fiduciary duty," including "damages for mental or emotional distress." *Id.*, at 490. Moreover, the liability under § 409(a) "is against the fiduciary personally, not the plan." *Id.*, at 490, n. 8.

The Court of Appeals also held that punitive damages could be recovered under § 409(a), although it decided that such an award is permitted only if the fiduciary "acted with actual malice or wanton indifference to the rights of a participant or beneficiary." *Id.*, at 492. The court believed that this result was supported by the text of § 409(a) and by the congressional purpose to provide broad remedies to redress and prevent violations of the Act.

We granted certiorari, 469 U. S. 816 (1984), to review both the compensatory and punitive components of the Court of Appeals' holding that § 409 authorizes recovery of extracontractual damages.[4] Respondent defends the judgment of the Court of Appeals both on its reasoning that § 409 provides an express basis for extracontractual damages, as well as by arguing that in any event such a private remedy should be inferred under the analysis employed in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975). We reject both arguments.

[4] Respondent did not file a cross-petition and therefore has not questioned the Court of Appeals' holding that her state-law causes of action are pre-empted by ERISA.

I

As its caption implies, § 409(a) establishes "LIABILITY FOR BREACH OF FIDUCIARY DUTY."[5] Specifically, it provides:

> "(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act."[6] 88 Stat. 886, 29 U. S. C. § 1109(a).

Sections 501 and 502 authorize, respectively, criminal and civil enforcement of the Act. While the former section provides for criminal penalties against any person who willfully violates any of the reporting and disclosure requirements of the Act,[7] the latter section identifies six types of civil actions

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[5] Because respondent relies entirely on § 409(a), and expressly disclaims reliance on § 502(a)(3), we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages. Tr. Oral Arg. 31–32.

[6] Section 411 prohibits any person who has been convicted of certain enumerated offenses from serving as an administrator or fiduciary of a regulated plan. See 88 Stat. 887, 29 U. S. C. § 1111.

[7] Section 501 reads as follows:

"Any person who willfully violates any portion of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000." 88 Stat. 891, 29 U. S. C. § 1131.

Part 1 of the subtitle, which consists of §§ 101–111, imposes elaborate reporting and disclosure requirements on plan administrators. See 88 Stat. 840–851, 29 U. S. C. §§ 1021–1031.

that may be brought by various parties. Most relevant to our inquiry is § 502(a), which provides in part:

> "A civil action may be brought—
>
> "(1) by a participant or beneficiary—
>
> "(A) for the relief provided for in subsection (c) of this section, or
>
> "(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> "(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 . . . ." 88 Stat. 891, 29 U. S. C. § 1132(a).

There can be no disagreement with the Court of Appeals' conclusion that § 502(a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § 409. Petitioner contends, however, that recovery for a violation of § 409 inures to the benefit of the plan as a whole. We find this contention supported by the text of § 409, by the statutory provisions defining the duties of a fiduciary, and by the provisions defining the rights of a beneficiary.

The Court of Appeals' opinion focused on the reference in § 409 to "such other equitable or remedial relief as the court may deem appropriate." But when the entire section is examined, the emphasis on the relationship between the fiduciary and the plan as an entity becomes apparent. Thus, not only is the relevant fiduciary relationship characterized at the outset as one "with respect to a plan," but the potential personal liability of the fiduciary is "to make good *to such plan* any losses *to the plan* . . . and to restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan* . . . ."[8]

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[8] The Committee Reports also emphasize the fiduciary's personal liability for losses *to the plan*. See H. R. Conf. Rep. No. 93–1280, p. 320 (1974),

To read directly from the opening clause of § 409(a), which identifies the proscribed acts, to the "catchall" remedy phrase at the end—skipping over the intervening language establishing remedies benefiting, in the first instance, solely

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reprinted in 3 Subcommittee on Labor and Public Welfare of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974, p. 4587 (Comm. print 1976) (hereinafter Leg. Hist.); S. Rep. No. 93–383, pp. 8, 32, 105 (1973), 1 Leg. Hist. 1076, 1100, 1173; S. Rep. No. 93–127, p. 33 (1973), 1 Leg. Hist. 619.

The floor debate also reveals that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future. See 120 Cong. Rec. 29932 (1974) ("[T]he legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets") (remarks of Sen. Williams), reprinted in 3 Leg. Hist. 4743; 120 Cong. Rec. 29951 (1974) ("This bill will establish judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds") (remarks of Sen. Bentsen), reprinted in 3 Leg. Hist. 4795; 120 Cong. Rec. 29954 (1974) ("[I]nstances have arisen in which pension funds have been used improperly by plan managers and fiduciaries. . . . [T]his bill contains measures designed to reduce substantially the potentialities for abuse") (remarks of Sen. Nelson), reprinted in 3 Leg. Hist. 4803; 120 Cong. Rec. 29957 (1974) ("In addition, frequently the pension funds themselves are abused by those responsible for their management who manipulate them for their own purposes or make poor investments with them") (remarks of Sen. Ribicoff), reprinted in 3 Leg. Hist. 4811; 120 Cong. Rec. 29957 (1974) ("[M]isuse, manipulation, and poor management of pension trust funds are all too frequent") (remarks of Sen. Ribicoff), reprinted in 3 Leg. Hist. 4812; 120 Cong. Rec. 29961 (1974) ("This legislation . . . sets fiduciary standards to insure that pension funds are not mismanaged") (remarks of Sen. Clark), reprinted in 3 Leg. Hist. 4823; 120 Cong. Rec. 29194 (1974) (ERISA contains "provisions to insure fair handling of a worker's money") (remarks of Rep. Biaggi), reprinted in 3 Leg. Hist. 4661; 120 Cong. Rec. 29196–29197 (1974) ("These standards . . . will prevent abuses . . . by those dealing with plans") (remarks of Rep. Dent), reprinted in 3 Leg. Hist. 4668; 120 Cong. Rec. 29206 (1974) (ERISA imposes "fiduciary and disclosure standards to guard against fraud and abuse of pension funds") (remarks of Rep. Brademas), reprinted in 3 Leg. Hist. 4694.

the plan—would divorce the phrase being construed from its context and construct an entirely new *class* of relief available to entities other than the plan. Cf. *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 734 (1973); *United States* v. *Jones*, 131 U. S. 1, 19 (1889). This "blue pencil" method of statutory interpretation—omitting all words not part of the clauses deemed pertinent to the task at hand—impermissibly ignores the relevant context in which statutory language subsists. See *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961). In this case, this mode of interpretation would render superfluous the preceding clauses providing relief singularly to the plan, and would slight the language following after the phrase "such other equitable or remedial relief." Congress specified that this remedial phrase includes "removal of such fiduciary"—an example of the kind of "plan-related" relief provided by the more specific clauses it succeeds. A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.[9]

It is of course true that the fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan. But the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified in-

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[9] Consistent with this objective, § 502(a)(2), the enforcement provision for § 409, authorizes suits by four classes of party-plaintiffs: the Secretary of Labor, participants, beneficiaries, and fiduciaries. Inclusion of the Secretary of Labor is indicative of Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole. Indeed, the common interest shared by all four classes is in the financial integrity of the plan.

formation, and the avoidance of conflicts of interest.[10] Those duties are described in Part 4 of Title 1 of the Act, which is entitled "FIDUCIARY RESPONSIBILITY," see §§ 401–414, 88 Stat. 874–890, 29 U. S. C. §§ 1101–1114, whereas the statutory provisions relating to claim procedures are found in Part 5, dealing with "ADMINISTRATION AND ENFORCEMENT." §§ 502(a), 503, 88 Stat. 891, 893, 29 U. S. C. §§ 1132(a), 1133. The only section that concerns review of a claim that has been denied—§ 503—merely specifies that every plan shall comply with certain regulations promulgated by the Secretary of Labor.[11]

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[10] Accordingly, ERISA establishes duties of loyalty and care for fiduciaries. With regard to loyalty, the principal provision is § 406, which in general prohibits self-dealing and sales or exchanges between the plan, on the one hand, and "parties in interest" and "disqualified persons," on the other. See 88 Stat. 879–880, 29 U. S. C. § 1106. In the same vein, § 408(c)(2) prohibits compensating fiduciaries who are full-time employees of unions or employers. 88 Stat. 885, 29 U. S. C. § 1108(c)(2).

With regard to the duty of care, § 404, among other obligations, imposes a "prudent person" standard by which to measure fiduciaries' investment decisions and disposition of assets. See 88 Stat. 877, 29 U. S. C. § 1104(a)(1)(B). Section 404 also mandates that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries." 88 Stat. 877, 29 U. S. C. § 1104(a)(1).

[11] Section 503 provides:

"In accordance with regulations of the Secretary, every employee benefit plan shall—

"(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

"(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 88 Stat. 893, 29 U. S. C. § 1133.

The Secretary of Labor's rulemaking power is contained in § 505, 88 Stat. 894, 29 U. S. C. § 1135.

The Secretary's regulations contemplate that a decision "shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review, unless special circumstances . . . require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of a request for review." 29 CFR § 2560.503–1(h)(1)(i) (1984). Nothing in the regulations or in the statute, however, expressly provides for a recovery from either the plan itself or from its administrators if greater time is required to determine the merits of an application for benefits. Rather, the regulations merely state that a claim may be treated as having been denied after the 60- or 120-day period has elapsed. See § 2560.503–1(h)(4) ("If the decision on review is not furnished within such time, the claim shall be *deemed* denied on review" (emphasis added)). This provision therefore enables a claimant to bring a civil action to have the merits of his application determined, just as he may bring an action to challenge an outright denial of benefits.

Significantly, the statutory provision explicitly authorizing a beneficiary to bring an action to enforce his rights under the plan—§ 502(a)(1)(B), quoted *supra*, at 140—says nothing about the recovery of extracontractual damages, or about the possible consequences of delay in the plan administrators' processing of a disputed claim. Thus, there really is nothing at all in the statutory text to support the conclusion that such a delay gives rise to a private right of action for compensatory or punitive relief. And the entire text of § 409 persuades us that Congress did not intend that section to authorize any relief except for the plan itself. In short, unlike the Court of Appeals, we do not find in § 409 express authority for an award of extracontractual damages to a beneficiary.[12]

[12] In light of this holding, we do not reach any question concerning the extent to which § 409 may authorize recovery of extracontractual compensatory or punitive damages from a fiduciary by a *plan*.

II

Relying on the four-factor analysis employed by the Court in *Cort* v. *Ash*, 422 U. S., at 78,[13] respondent argues that a private right of action for extracontractual damages should be implied even if it is not expressly authorized by ERISA. Two of the four *Cort* factors unquestionably support respondent's claim: respondent is a member of the class for whose benefit the statute was enacted and, in view of the preemptive effect of ERISA, there is no state-law impediment to implying a remedy. But the two other factors—legislative intent and consistency with the legislative scheme—point in the opposite direction. And "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 94 (1981). "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California* v. *Sierra Club*, 451 U. S. 287, 297 (1981).

The voluminous legislative history of the Act contradicts respondent's position. It is true that an early version of the

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[13] "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e. g.*, *National Railroad Passenger Corporation* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458, 460 (1974) *(Amtrak)*. Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort* v. *Ash*, 422 U. S., at 78 (citations omitted).

statute contained a provision for "legal or equitable" relief that was described in both the Senate and House Committee Reports as authorizing "the full range of legal and equitable remedies available in both state and federal courts." H. R. Rep. No. 93–533, p. 17 (1973), 2 Leg. Hist. 2364; S. Rep. No. 93–127, p. 35 (1973), 1 Leg. Hist. 621. But that language appeared in Committee Reports describing a version of the bill before the debate on the floor and before the Senate-House Conference Committee had finalized the operative language.[14] In the bill passed by the House of Representatives and ultimately adopted by the Conference Committee the reference to legal relief was deleted. The language relied on by respondent and by the Court of Appeals below, therefore, is of little help in understanding whether Congress intended to make fiduciaries personally liable to beneficiaries for extracontractual damages.

The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute." *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 361 (1980). If in this case, for example, the plan administrator had adhered to his initial determination that respondent was not entitled to disability benefits under the plan, respondent would have had a panoply of remedial devices at her disposal. To recover the

[14] This provision, which was part of H. R. 2 as passed by the Senate, provided for "[c]ivil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation, or duty of a fiduciary." H. R. 2, § 693, 93d Cong., 2d Sess. (Mar. 4, 1974), 3 Leg. Hist. 3816. (It was also part of earlier bills. See S. 4, § 603, 93d Cong., 1st Sess. (Apr. 18. 1973), 1 Leg. Hist. 579; see also S. 1179, § 501(d), 93d Cong., 1st Sess. (Aug. 21, 1973), 1 Leg. Hist. 950.)

benefits due her, she could have filed an action pursuant to § 502(a)(1)(B) to recover accrued benefits, to obtain a declaratory judgment that she is entitled to benefits under the provisions of the plan contract, and to enjoin the plan administrator from improperly refusing to pay benefits in the future. If the plan administrator's refusal to pay contractually authorized benefits had been willful and part of a larger systematic breach of fiduciary obligations, respondent in this hypothetical could have asked for removal of the fiduciary pursuant to §§ 502(a)(2) and 409. Finally, in answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims, thereby risking underenforcement of beneficiaries' statutory rights, it should be noted that ERISA authorizes the award of attorney's fees. See § 502(g), 88 Stat. 892, as amended, 29 U. S. C. § 1132(g)(1).

We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 19 (1979): "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." See also *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 571–574 (1979). "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S., at 97.[15]

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[15] See *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 14–15 (1981); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639–640 (1981); *California* v. *Sierra Club*, 451 U. S. 287, 295, n. 6 (1981); *National Railroad Passenger Corporation* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458 (1974); *Nashville Milk Co.* v. *Carnation Co.*, 355 U. S. 373, 375–376 (1958); *Switchmen* v. *National Mediation Board*, 320 U. S. 297, 301 (1943); *Botany Worsted Mills* v. *United States*, 278 U. S. 282, 289 (1929).

In contrast to the repeatedly emphasized purpose to protect contractually defined benefits,[16] there is a stark absence—in the statute itself and in its legislative history—of any reference to an intention to authorize the recovery of extracontractual damages.[17] Because "neither the statute nor the legislative history reveals a congressional intent to create a private right of action . . . we need not carry the *Cort* v. *Ash* inquiry further." *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S., at 94, n. 31.

III

Thus, the relevant text of ERISA, the structure of the entire statute, and its legislative history all support the conclusion that in § 409(a) Congress did not provide, and did not intend the judiciary to imply, a cause of action for extracontractual damages caused by improper or untimely processing of benefit claims.

The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in the judgment.

Section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1132(a), provides a wide array of measures to employee-benefit plan participants and beneficiaries by which they may enforce their rights under ERISA and under the terms of their plans. A partici-

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[16] See, *e. g.*, *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 374–375 (1980); 120 Cong. Rec. 29196 (1974), 3 Leg. Hist. 4665; 119 Cong. Rec. 30041 (1973), 2 Leg. Hist. 1633.

[17] Indeed, Congress was concerned lest the cost of federal standards discourage the growth of private pension plans. See, *e. g.*, H. R. Rep. No. 93–533, 1, 9 (1973), 2 Leg. Hist. 2348, 2356; 120 Cong. Rec. 29949 (1974), 3 Leg. Hist. 4791; 120 Cong. Rec. 29210–29211 (1974), 3 Leg. Hist. 4706–4707.

pant or beneficiary may file a civil action, for example, (1) "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan," § 502(a)(1)(B); (2) "for appropriate relief under section 409," § 502(a)(2); and (3) "to enjoin any act or practice which violates any provision of this title or the terms of the plan, or . . . to obtain *other appropriate equitable relief . . . to redress such violations*," § 502(a)(3) (emphasis added).[1]

This case presents a single, narrow question: whether the § 409 "appropriate relief" referred to in § 502(a)(2) includes individual recovery by a participant or beneficiary of extra-contractual damages for breach of fiduciary duty. The Court of Appeals for the Ninth Circuit held that, because § 409 broadly authorizes "such other equitable or remedial relief as the court may deem appropriate,"[2] participants and benefi-

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[1] Section 502(a), 88 Stat. 891, 29 U. S. C. § 1132(a), provides in full:

"A civil action may be brought—

"(1) by a participant or beneficiary—

"(A) for the relief provided for in subsection (c) of this section, or

"(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

"(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

"(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

"(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 105(c);

"(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (b) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

"(6) by the Secretary to collect any civil penalty under subsection (i)."

[2] Section 409, 88 Stat. 886, 29 U. S. C. § 1109, provides:

"(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries

ciaries may recover such damages under that section. 722 F. 2d 482, 488–489 (1983). I agree with the Court's decision today that § 409 is more fairly read in context as providing "remedies that would protect the entire plan" rather than individuals, *ante*, at 142, and that participants and beneficiaries accordingly must look elsewhere in ERISA for personal relief. Indeed, since § 502(a)(3) already provides participants and beneficiaries with "other appropriate equitable relief . . . to redress [ERISA] violations," there is no reason to construe § 409 expansively in order to bring these individuals under the penumbra of "equitable or remedial relief."

This does not resolve, of course, whether and to what extent extracontractual damages are available under § 502(a)(3). This question was not addressed by the courts below and was not briefed by the parties and *amici*. Thus the Court properly emphasizes that "we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages." *Ante*, at 139, n. 5. Accordingly, we save for another day the questions (1) to what extent a fiduciary's mishandling of a claim might constitute an actionable breach of the fiduciary duties set forth in § 404(a), and (2) the nature and extent of the "appropriate equitable relief . . . to redress" such violations under § 502(a)(3).

There is dicta in the Court's opinion, however, that could be construed as sweeping more broadly than the narrow ground of resolution set forth above. Although the Court

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by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

"(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary."

takes care to limit the binding effect of its decision to the terms of § 409,[3] its opinion at some points seems to speak generally of whether fiduciaries ever may be held personally liable to beneficiaries for extracontractual damages.[4] Moreover, some of the Court's remarks are simply incompatible with the structure, legislative history, and purposes of ERISA. The Court's ambiguous discussion is certainly subject to different readings, and in any event is without controlling significance beyond the question of relief under § 409. I write separately to outline what I believe is the proper approach for courts to take in construing ERISA's provisions and to emphasize the issues left open under today's decision.

Fiduciary Duties in Claims Administration

There is language in the Court's opinion that might be read as suggesting that the fiduciary duties imposed by ERISA on plan administrators for the most part run only to the plan itself, as opposed to individual beneficiaries. See *ante*, at 142–144. The Court apparently thinks there might be some significance in the fact that an administrator's fiduciary duties "are described in Part 4 of Title 1 of the Act . . . whereas the statutory provisions relating to claim procedures are found in Part 5." *Ante*, at 143. Accordingly, the Court seems to believe that the duties and remedies associated with claims processing might be restricted to those explicitly spelled out in §§ 502(a)(1)(B) and 503. *Ante*, at 142–144.

To the extent the Court suggests that administrators might not be fully subject to strict fiduciary duties to participants and beneficiaries in the processing of their claims and

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[3] See, *e. g.*, *ante*, at 138 ("We granted certiorari . . . to review both the compensatory and punitive components of the Court of Appeals' holding that § 409 authorizes recovery of extracontractual damages"); *ante*, at 138, n. 4; *ante*, at 144 ("[W]e do not find in § 409 express authority for an award of extracontractual damages to a beneficiary"); *ante*, at 148.

[4] See, *e. g.*, *ante*, at 136, 142–144, 146–148.

to traditional trust-law remedies for breaches of those duties, I could not more strongly disagree. As the Court acknowledges in a footnote, *ante*, at 142, n. 9, § 404(a) sets forth the governing standard that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries."[5] That section also provides that, in carrying out these duties, a fiduciary shall exercise "the care, skill, prudence, and diligence" of a "prudent man acting in like capacity." The legislative history demonstrates that Congress intended by § 404(a) to incorporate the fiduciary standards of trust law into ERISA,[6] and it is black-letter trust law that fiduciaries

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[5] Section 404(a), 88 Stat. 877, as amended, 94 Stat. 1296, 29 U. S. C. § 1104(a), provides in relevant part:

"(1) . . . [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

"(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;

"(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

"(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

"(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV."

[6] See, *e. g.*, H. R. Rep. No. 93-533, p. 11 (1973) ("The fiduciary responsibility section, in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts"); *id.*, at 13:

"The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans. These salient principles place a twofold duty on every fiduciary: to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of

owe strict duties running directly to beneficiaries in the administration and payment of trust benefits.[7] The legislative history also shows that Congress intended these fiduciary standards to govern the ERISA claims-administration process.[8]

Moreover, the Court's suggestion concerning the distinction between Parts 4 and 5 of Title I is thoroughly unconvincing. Section 502(a)(3) authorizes the award of "appropriate equitable relief" directly to a participant or beneficiary to "redress" "*any* act or practice which violates *any* provision of this title or the terms of the plan."[9] This section and

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administering the trust for the exclusive purposes previously enumerated, and in accordance with the documents and instruments governing the fund unless they are inconsistent with the fiduciary principles of the section."

See also S. Rep. No. 93–127, pp. 28–29 (1973); H. R. Conf. Rep. No. 93–1280, p. 303 (1974) ("[T]he assets of the employee benefit plan are to be held for the exclusive benefit of participants and beneficiaries"); 120 Cong. Rec. 29932 (1974) (remarks of Sen. Williams); *Central States Pension Fund* v. *Central Transport, Inc.*, 472 U. S. 559, 570 (1985) ("Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility"); *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms"); *Leigh* v. *Engle*, 727 F. 2d 113, 122 (CA7 1984); *Donovan* v. *Mazzola*, 716 F. 2d 1226, 1231 (CA9 1983); *Sinai Hospital of Baltimore, Inc.* v. *National Benefit Fund For Hospital & Health Care Employees*, 697 F. 2d 562, 565–566 (CA4 1982); *Donovan* v. *Bierwirth*, 680 F. 2d 263, 271 (CA2), cert. denied, 459 U. S. 1069 (1982).

[7] See, *e. g.*, Restatement (Second) of Trusts § 182 (1959); G. Bogert & G. Bogert, Law of Trusts § 109 (1973).

[8] See, *e. g.*, 120 Cong. Rec. 29929 (1974) (remarks of Sen. Williams) (emphasis added) (ERISA imposes "strict fiduciary obligations upon those who exercise management or control over the assets or *administration* of an employee pension or welfare plan"); H. R. Conf. Rep. No. 93–1280, at 301, and n. 1 (*re* procedures for delegating fiduciary duties, including "allocation or delegation of duties with respect to payment of benefits").

[9] The Conference Report emphasized that participants and beneficiaries were entitled under § 502 not only to "recover benefits due under the plan"

§ 404(a)'s fiduciary-duty standards both appear in Title I, which is entitled "PROTECTION OF EMPLOYEE BENEFIT RIGHTS." A beneficiary therefore may obtain "appropriate equitable relief" whenever an administrator breaches the fiduciary duties set forth in § 404(a).[10] Accordingly, an administrator's claims-processing duties and a beneficiary's corresponding remedies are not at all necessarily limited to the terms of §§ 502(a)(1)(B) and 503. In light of the Court's narrow holding, see *ante*, at 139, n. 5, further consideration of these important issues remains open for another day when the disposition of a controversy might really turn on them.

Judicial Construction of ERISA

Russell argues that a private right of action for beneficiaries and participants should be read into § 409. Because the Court has concluded that Congress' intent and ERISA's overall structure restrict the scope of § 409 to recovery on behalf of a plan, *ante*, at 139–142, such a private right is squarely barred under the standards set forth in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975).[11]

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and to "clarify rights to receive future benefits under the plan," but also to obtain other "relief from breach of fiduciary duty." *Id.*, at 326–327. See also 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams) (beneficiaries entitled to recover benefits "as well as to obtain redress of fiduciary violations").

[10] Trust-law remedies are equitable in nature, and include provision of monetary damages. See, *e. g.*, G. Bogert & G. Bogert, Law of Trusts and Trustees § 862 (2d ed. 1982) (hereinafter Bogert & Bogert, Trusts and Trustees); Restatement (Second) of Trusts §§ 199, 205 (1959). Thus while a given form of monetary relief may be unavailable under ERISA for other reasons, see *infra*, at 157–158, it cannot be withheld simply because a beneficiary's remedies under ERISA are denominated "equitable." See also Restatement (Second) of Torts § 874, Comment *b* (1979) ("Violation of Fiduciary Duty") (although "[t]he remedy of a beneficiary against a defaulting or negligent trustee is ordinarily in equity," the beneficiary is entitled to all redress "for harm caused by the breach of a duty arising from the relation").

[11] An implied action for personal recovery is specifically barred under the second and third factors set forth in *Cort* v. *Ash:* "is there any indication of

In disposing of this relatively straightforward issue, the Court makes some observations about the role of courts generally in construing and enforcing ERISA. The Court suggests, for example, that Congress "crafted" ERISA with "carefully integrated" remedies so as to create an "interlocking, interrelated, and interdependent remedial scheme" that courts should not "tamper with." *Ante*, at 146, 147.

The Court's discussion, I say respectfully, is both unnecessary and to some extent completely erroneous. The Court may or may not be correct as a general matter with respect to implying private rights of action under ERISA; as the respondent has sought such an implied right only under § 409,[12] we of course cannot purport to resolve this question in the many other contexts in which it might arise under the statute. Moreover, the Court's remarks about the constrictive judicial role in enforcing ERISA's remedial scheme are inaccurate insofar as Congress provided in § 502(a)(3) that beneficiaries could recover, in addition to the remedies explicitly set forth in that section, "other appropriate equitable relief . . . to redress" ERISA violations. Congress already had instructed that beneficiaries could recover benefits, obtain broad injunctive and declaratory relief for their own personal benefit or for the benefit of their plans, and secure attorney's fees, so this additional provision can only be read precisely as authorizing federal courts to "fine-tune" ERISA's remedial scheme. Thus while it may well be that courts generally may not find implied private remedies in ERISA, the Court's remarks have little bearing on how courts are to go about construing the private remedy that Congress explicitly provided in § 502(a)(3).

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legislative intent, explicit or implicit, either to create such a remedy or to deny one?," and "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" 422 U. S., at 78.

[12] "Section [502] specifically allows beneficiaries to sue under Section [409]. However, even if it did not, a private right of action for participants and beneficiaries could be read into Section [409]." Brief for Respondent 14; see also *id.*, at 2.

The legislative history demonstrates that Congress intended federal courts to develop federal common law in fashioning the additional "appropriate equitable relief." In presenting the Conference Report to the full Senate, for example, Senator Javits, ranking minority member of the Senate Committee on Labor and Public Welfare and one of the two principal Senate sponsors of ERISA, stated that "[i]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."[13] Senator Williams, the Committee's Chairman and the Act's other principal Senate sponsor, similarly emphasized that suits involving beneficiaries' rights "will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act."[14] Section 301, of course, "authorizes federal courts to fashion a body of federal law" in the context of collective-bargaining agreements, to be derived by "looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 451, 457 (1957).[15] ERISA's legislative history also demonstrates beyond question that Congress intended to engraft trust-law principles onto the enforcement

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[13] 120 Cong. Rec. 29942 (1974).

[14] *Id.*, at 29933. See also H. R. Conf. Rep. No. 93–1280, at 327 ("All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under Section 301 of the Labor-Management Relations Act of 1947").

[15] See also *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 688 (1978) (footnote omitted): "Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose." It seems to me that ERISA, with its incorporation of trust law, deserves a similarly generous and flexible construction.

scheme, see n. 6, *supra*, and a fundamental concept of trust law is that courts "will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests."[16] Thus ERISA was *not* so "carefully integrated" and "crafted" as to preclude further judicial delineation of appropriate rights and remedies; far from barring such a process, the statute explicitly directs that courts shall undertake it.

The Court today expressly reserves the question whether extracontractual damages might be one form of "other appropriate relief" under § 502(a)(3). *Ante*, at 139, n. 5. I believe that, in resolving this and other questions concerning appropriate relief under ERISA, courts should begin by ascertaining the extent to which trust and pension law as developed by state and federal courts provide for recovery by the beneficiary above and beyond the benefits that have been withheld;[17] this is the logical first step, given that Congress intended to incorporate trust law into ERISA's equitable remedies.[18] If a requested form of additional relief is

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[16] 3 A. Scott, Law of Trusts § 199, p. 1638 (1967). See also Restatement (Second) of Trusts § 205, and Comment *a* (1959) (beneficiary entitled to a remedy "which will put him in the position in which he would have been if the trustee had not committed the breach of trust"); Bogert & Bogert, Trusts and Trustees § 862.

[17] The absence of such relief under traditional trust law is not necessarily dispositive, however, because "in enacting ERISA Congress made *more* exacting the requirements of the common law of trusts relating to employee benefit trust funds." *Donovan* v. *Mazzola*, 716 F. 2d, at 1231 (emphasis added); see also *Sinai Hospital of Baltimore, Inc.* v. *National Benefit Fund for Hospital & Health Care Employees*, 697 F. 2d, at 565–566.

[18] "Where the courts are required themselves to fashion a federal rule of decision, the source of that law must be federal and uniform. Yet, state law where compatible with national policy may be resorted to and adopted as a federal rule of decision. . . . Here, of course, there is little federal law to which the court may turn for guidance. State regulation of insurance, pensions, and other such programs, however, provides a pre-existing source of experience and experiment in an area in which there is, as yet, only federal inexperience. Much of what the states have thus far devel-

available under state trust law, courts should next consider whether allowance of such relief would significantly conflict with some other aspect of the ERISA scheme. In addition, courts must always bear in mind the ultimate consideration whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA—enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries. See *supra*, at 152–153.

I concur in the judgment of the Court.

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oped, particularly in the insurance field, is statutory. In certain areas of public concern, the state legislatures have been quite active in enacting comprehensive regulatory schemes, and state statutory sources of law will no doubt play a major role in the development of a federal common law under ERISA, particularly in defining rights under employee benefit plans." *Wayne Chemical, Inc.* v. *Columbus Agency Service Corp.*, 426 F. Supp. 316, 325 (ND Ind.), modified on other grounds, 567 F. 2d 692 (CA7 1977).

Syllabus

KENTUCKY, DBA BUREAU OF STATE POLICE *v.* GRAHAM ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84–849. Argued April 16, 1985—Decided June 28, 1985

Respondents were arrested following the warrantless raid of a house in Kentucky by local and state police officers who were seeking a murder suspect. Claiming a deprivation of federal rights allegedly resulting from the police's use of excessive force and other constitutional violations accompanying the raid, respondents filed suit in Federal District Court under, *inter alia*, 42 U. S. C. § 1983, seeking money damages. Among the named defendants were the Commissioner of the Kentucky State Police, "individually and as Commissioner," and the Commonwealth of Kentucky, which was sued only for attorney's fees should respondents eventually prevail. The District Court, relying on the Eleventh Amendment, dismissed the Commonwealth as a party. On the second day of trial, the case was settled in favor of respondents, who then moved that the Commonwealth pay their costs and attorney's fees pursuant to 42 U. S. C. § 1988, which provides that in any action to enforce § 1983, the court may allow "the prevailing party . . . a reasonable attorney's fee as part of the costs." The District Court granted the motion, and the Court of Appeals affirmed.

Held: Section 1988 does not allow attorney's fees to be recovered from a governmental entity when a plaintiff sues governmental employees only in their personal capacities and prevails; accordingly, since this case was necessarily litigated as a personal-capacity and not as an official-capacity action, it was error to award fees against the Commonwealth. Pp. 163–171.

(a) While § 1988 does not define the parties who must bear the costs, the logical place to look for recovery of fees is to the losing party. Liability on the merits and responsibility for fees go hand in hand. Where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant. Pp. 163–165.

(b) Personal-capacity suits seek to impose personal liability upon a government officer for actions he takes under color of state law, whereas official-capacity suits against an officer are generally treated as suits against the governmental entity of which the officer is an agent. With this distinction in mind, it is clear that a suit against a government offi-

cer in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity. Pp. 165–168.

(c) To hold that fees can be recovered from a governmental entity following victory in a personal-capacity action against government officials would be inconsistent with the rule that the entity cannot be made liable on the merits under § 1983 on a *respondeat superior* basis. Nothing in § 1988's history suggests that fee liability was intended to be imposed on that basis. Section 1988 simply does not create fee liability where merits liability is nonexistent. P. 168.

(d) Although the State Police Commissioner was named as a defendant in both his "individual" and "official" capacities and the Commonwealth was named as a defendant for the limited purpose of a fee award, there can be no doubt, given Eleventh Amendment doctrine, that the action did not seek to impose monetary liability on the Commonwealth. Absent waiver by a State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court, a bar that remains in effect when state officials are sued for damages in their official capacity. Accordingly, an official-capacity damages action could not have been maintained against the Commissioner in federal court. Respondents cannot seek damages from the Commonwealth simply by suing Commonwealth officials in their official capacity, nor did respondents' action on the merits become a suit against the Commonwealth by simply naming it as a defendant on the limited issue of fee liability. Pp. 168–170.

(e) *Hutto* v. *Finney*, 437 U. S. 678, did not alter the basic philosophy of § 1988 that fees and merits liability run together, nor did it hold or suggest that fees are available from a governmental entity simply because a government official has been prevailed against in his or her personal capacity. Pp. 170–171.

742 F. 2d 1455, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

George M. Geoghegan, Jr., Assistant Attorney General of Kentucky, argued the cause for petitioner. With him on the brief were *David L. Armstrong*, Attorney General, and *Cathy Cravens Snell*.

Jack M. Lowery, Jr., argued the cause for respondents. With him on the brief was *Hollis L. Searcy*.*

**Joyce Holmes Benjamin, H. Bartow Farr III, Paul M. Smith*, and *Joseph N. Onek* filed a brief for the National League of Cities et al. as *amici curiae* urging reversal.

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether 42 U. S. C. § 1988 allows attorney's fees to be recovered from a governmental entity when a plaintiff sues governmental employees only in their personal capacities and prevails.

I

On November 7, 1979, a Kentucky state trooper was murdered. Suspicion quickly focused on Clyde Graham, whose stepmother's car was found near the site of the slaying and whose driver's license and billfold were discovered in nearby bushes. That evening, 30 to 40 city, county, and state police officers converged on the house of Graham's father in Elizabethtown, Kentucky. Without a warrant, the police entered the home twice and eventually arrested all the occupants, who are the six respondents here. Graham was not among them.[1] According to respondents, they were severely beaten, terrorized, illegally searched, and falsely arrested. Kenneth Brandenburgh, the Commissioner of the State Police and the highest ranking law enforcement officer in Kentucky, allegedly was directly involved in carrying out at least one of the raids. An investigation by the Kentucky Attorney General's office later concluded that the police had used excessive force and that a "complete breakdown" in police discipline had created an "uncontrolled" situation. App. to Brief for Respondents 21–22.

Alleging a deprivation of a number of federal rights, respondents filed suit in Federal District Court.[2] Their com-

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[1] Clyde Graham was killed by a Kentucky state trooper a month later at a motel in Illinois.

[2] Respondents asserted causes of action under 42 U. S. C. §§ 1983, 1985, 1986, and 1988, as well as the Fourth, Fifth, Sixth, Eleventh, and Fourteenth Amendments. Complaint ¶ 13. Because the case was settled, there has been no need below to separate out or distinguish any of these purported causes of action. Before this Court, the parties briefed and argued the case as if it had been brought simply as a § 1983 action and we, accordingly,

plaint sought only money damages and named as defendants various local and state law enforcement officers, the city of Elizabethtown, and Hardin County, Kentucky. Also made defendants were Commissioner Brandenburgh, "individually and as Commissioner of the Bureau of State Police," and the Commonwealth of Kentucky. The Commonwealth was sued, not for damages on the merits, but only for attorney's fees should the plaintiffs eventually prevail.[3] Shortly after the complaint was filed, the District Court, relying on the Eleventh Amendment, dismissed the Commonwealth as a party. Based on its Attorney General's report, the Commonwealth refused to defend any of the individual defendants, including Commissioner Brandenburgh, or to pay their litigation expenses.

On the second day of trial, the case was settled for $60,000.[4] The settlement agreement, embodied in a court order dismissing the case, barred respondents from seeking attorney's fees from any of the individual defendants but specifically preserved respondents' right to seek fees and court costs from the Commonwealth. Respondents then moved, pursuant to 42 U. S. C. § 1988, that the Commonwealth pay their costs and attorney's fees. At a hearing on this motion, the Commonwealth argued that the fee request had to be

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analyze it the same way. Our discussion throughout is therefore not meant to express any view on suits brought under any provision of federal law other than § 1983.

[3] The complaint states:

"Pursuant to the provisions of 42 U. S. C. Sec. 1988, the Commonwealth of Kentucky, d/b/a Bureau of State Police is liable for the payment of reasonable attorney fees incurred in this action." Complaint ¶ 4(D).

According to respondents, "[p]aragraph 4(D) . . . states the sole basis for including the Commonwealth as a named party." Brief for Respondents 14.

[4] Five thousand dollars came from the city and $10,000 from the county. The remaining $45,000 was to be paid by Commissioner Brandenburgh, both personally and as agent for the "Kentucky State Police Legal Fund." The latter was not a named defendant but presumably represented the interests of the individual officers sued.

denied as a matter of law, both because the Commonwealth had been dismissed as a party and because the Eleventh Amendment, in any event, barred such an award. Rejecting these arguments, the District Court ordered the Commonwealth to pay $58,521 in fees and more than $6,000 in costs and expenses.[5] In a short *per curiam* opinion relying solely on this Court's decision in *Hutto* v. *Finney*, 437 U. S. 678 (1978), the Court of Appeals for the Sixth Circuit affirmed. *Graham* v. *Wilson*, 742 F. 2d 1455 (1984).

We granted certiorari to address the proposition, rejected by at least two Courts of Appeals,[6] that fees can be recovered from a governmental entity when a plaintiff prevails in a suit against government employees in their personal capacities. 469 U. S. 1156 (1985). We now reverse.

II

This case requires us to unravel once again the distinctions between personal- and official-capacity suits, see *Brandon* v. *Holt*, 469 U. S. 464 (1985), this time in the context of fee awards under 42 U. S. C. § 1988. The relevant portion of § 1988, enacted as the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, provides:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow *the prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs" (emphasis added).

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[5] Petitioner did not appeal from the award of costs and expenses, and we therefore have no occasion to consider the appropriateness of these portions of the award.

[6] *Berry* v. *McLemore*, 670 F. 2d 30 (CA5 1982) (municipal officials); *Morrison* v. *Fox*, 660 F. 2d 87 (CA3 1981) (same). At least one Court of Appeals appears to have reached the same result as that of the lower court in this case. See *Glover* v. *Alabama Department of Corrections*, 753 F. 2d 1569 (CA11 1985).

If a plaintiff prevails in a suit covered by § 1988, fees should be awarded as costs "unless special circumstances would render such an award unjust." S. Rep. No. 94–1011, p. 4 (1976); see *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U. S. 719, 737 (1980). Section 1988 does not in so many words define the parties who must bear these costs. Nonetheless, it is clear that the logical place to look for recovery of fees is to the losing party—the party legally responsible for relief on the merits. That is the party who must pay the costs of the litigation, see generally Fed. Rule Civ. Proc. 54(d),[7] and it is clearly the party who should also bear fee liability under § 1988.

We recognized as much in *Supreme Court of Virginia*, *supra*. There a three-judge District Court had found the Virginia Supreme Court and its chief justice in his official capacity liable for promulgating, and refusing to amend, a State Bar Code that violated the First Amendment. The District Court also awarded fees against these defendants pursuant to § 1988. We held that absolute legislative immunity shielded these defendants for acts taken in their legislative capacity. We then vacated the fee award, stating that we found nothing "in the legislative history of the Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity." 446 U. S., at 738.[8]

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[7] See 6 J. Moore, W. Taggart, & J. Wicker, Moore's Federal Practice § 54.70[1], p. 1301 (1985) ("Costs" are awarded "against the losing party and as an incident of the judgment"); 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2666, p. 173 (1983) ("'Costs' refers to those charges that one party has incurred and is permitted to have reimbursed by his opponent as part of the judgment in the action").

[8] We did hold that the court and its chief justice in his official capacity could be enjoined from *enforcing* the State Bar Code and suggested that fees could be recovered from these defendants in their enforcement roles. Because the fee award had clearly been made against the defendants in their legislative roles, however, the award had to be vacated and the case remanded for further proceedings. That fees could be awarded against

Thus, liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant.[9] Cf. *Pulliam* v. *Allen*, 466 U. S. 522, 543–544 (1984) (state judge liable for injunctive and declaratory relief under § 1983 also liable for fees under § 1988).

A

Proper application of this principle in damages actions against public officials requires careful adherence to the distinction between personal- and official-capacity suits.[10] Because this distinction apparently continues to confuse lawyers and confound lower courts, we attempt to define it more clearly through concrete examples of the practical and doctrinal differences between personal- and official-capacity actions.

Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. See, *e. g.*, *Scheuer* v. *Rhodes*, 416 U. S. 232, 237–238 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690, n. 55

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the Virginia Supreme Court and its chief justice pursuant to an injunction against enforcement of the Code further illustrates that fee liability is tied to liability on the merits.

[9] The rules are somewhat different with respect to prevailing defendants. Prevailing defendants generally are entitled to costs, see Fed. Rule Civ. Proc. 54(d), but are entitled to fees only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. See *Hensley* v. *Eckerhart*, 461 U. S. 424, 429, n. 2 (1983).

We express no view as to the nature or degree of success necessary to make a plaintiff a prevailing party. See *Maher* v. *Gagne*, 448 U. S. 122 (1980).

[10] Personal-capacity actions are sometimes referred to as individual-capacity actions.

(1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon*, 469 U. S., at 471–472. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.[11]

On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. See, *e. g.*, *Monroe* v. *Pape*, 365 U. S. 167 (1961). More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a "'moving force'" behind the deprivation, *Polk County* v. *Dodson*, 454 U. S. 312, 326 (1981) (quoting *Monell*, *supra*, at 694); thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. *Monell*, *supra*; *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 817–818 (1985); *id.*, at 827–828 (BRENNAN, J., concurring in judgment).[12] When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such

[11] Should the offical die pending final resolution of a personal-capacity action, the plaintiff would have to pursue his action against the decedent's estate. In an official-capacity action in federal court, death or replacement of the named official will result in automatic substitution of the official's successor in office. See Fed. Rule Civ. Proc. 25(d)(1); Fed. Rule App. Proc. 43(c)(1); this Court's Rule 40.3.

[12] See *Monell*, 436 U. S., at 694 ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983").

as objectively reasonable reliance on existing law. See *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (absolute immunity); *Pierson* v. *Ray*, 386 U. S. 547 (1967) (same); *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982) (qualified immunity); *Wood* v. *Strickland*, 420 U. S. 308 (1975) (same). In an official-capacity action, these defenses are unavailable. *Owen* v. *City of Independence*, 445 U. S. 622 (1980); see also *Brandon* v. *Holt*, 469 U. S. 464 (1985).[13] The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment. While not exhaustive, this list illustrates the basic distinction between personal- and official-capacity actions.[14]

With this distinction in mind, it is clear that a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the

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[13] In addition, punitive damages are not available under § 1983 from a municipality, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981), but are available in a suit against an official personally, see *Smith* v. *Wade*, 461 U. S. 30 (1983).

[14] There is no longer a need to bring official-capacity actions against local government officials, for under *Monell*, *supra*, local government units can be sued directly for damages and injunctive or declaratory relief. See, *e. g.*, *Memphis Police Dept.* v. *Garner*, 471 U. S. 1 (1985) (decided with *Tennessee* v. *Garner*) (damages action against municipality). Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, however, a State cannot be sued directly in its own name regardless of the relief sought. *Alabama* v. *Pugh*, 438 U. S. 781 (1978) *(per curiam)*. Thus, implementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State. See *Ex parte Young*, 209 U. S. 123 (1908).

In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. "The course of proceedings" in such cases typically will indicate the nature of the liability sought to be imposed. *Brandon* v. *Holt*, 469 U. S. 464, 469 (1985).

entity that employs him. Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense. That a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone from a nonparty. Cf. *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983). Yet that would be the result were we to hold that fees can be recovered from a governmental entity following victory in a personal-capacity action against government officials.

B

Such a result also would be inconsistent with the statement in *Monell*, *supra*, that a municipality cannot be made liable under 42 U. S. C. § 1983 on a *respondeat superior* basis. Nothing in the history of § 1988, a statute designed to make effective the remedies created in § 1983 and similar statutes, suggests that fee liability, unlike merits liability, *was* intended to be imposed on a *respondeat superior* basis. On the contrary, just as Congress rejected making § 1983 a "mutual insurance" scheme, 436 U. S., at 694, Congress sought to avoid making § 1988 a "'relief fund for lawyers.'" *Hensley*, *supra*, at 446 (opinion of BRENNAN, J.) (quoting 122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy)). Section 1988 does not guarantee that lawyers will recover fees anytime their clients sue a government official in his personal capacity, with the governmental entity as ultimate insurer. Instead, fee liability runs with merits liability; if federal law does not make the government substantively liable on a *respondeat superior* basis, the government similarly is not liable for fees on that basis under § 1988. Section 1988 simply does not create fee liability where merits liability is nonexistent.

III

We conclude that this case was necessarily litigated as a personal-capacity action and that the Court of Appeals therefore erred in awarding fees against the Commonwealth of

Kentucky.[15] In asserting the contrary, respondents point out that the complaint expressly named Commissioner Brandenburgh in both his "individual" and "official" capacities and that the Commonwealth of Kentucky was named as a defendant for the limited purposes of a fee award. Nonetheless, given Eleventh Amendment doctrine, there can be no doubt that this damages action did not seek to impose monetary liability on the Commonwealth.[16]

The Court has held that, absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court.[17] See, *e. g.*, *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459, 464 (1945). This bar remains in effect when state officials are sued for damages in their official capacity. *Cory* v. *White*, 457 U. S. 85, 90 (1982); *Edelman* v. *Jordan*, 415 U. S. 651, 663 (1974). That is so because, as discussed above, "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents . . . ." *Brandon*, *supra*, at 471.[18]

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[15] The city and county were sued directly as entities, but that aspect of the case is not before us.

[16] See also n. 3, *supra*.

[17] The Court has held that § 1983 was not intended to abrogate a State's Eleventh Amendment immunity. *Quern* v. *Jordan*, 440 U. S. 332 (1979); *Edelman* v. *Jordan*, 415 U. S. 651 (1974). Because this action comes to us as if it arose solely under § 1983, see n. 2, *supra*, we cannot conclude that federal law authorized an official-capacity action for damages against Commissioner Brandenburgh to be brought in federal court.

As to legislative waiver of immunity, petitioners assert that the Commonwealth of Kentucky has not waived its Eleventh Amendment immunity. This contention is not disputed, and we therefore accept it for purposes of this case.

[18] In an injunctive or declaratory action grounded on federal law, the State's immunity *can* be overcome by naming state officials as defendants. See *Pennhurst State School & Hospital* v. *Halderman*, 465 U. S. 89 (1984); see also *Ex parte Young*, *supra*. Monetary relief that is "ancillary" to injunctive relief also is not barred by the Eleventh Amendment. *Edelman* v. *Jordan*, *supra*, at 667–668.

Given this understanding of the law, an official-capacity action for damages could not have been maintained against Commissioner Brandenburgh in federal court.[19] Although respondents fail to acknowledge this point, they freely concede that money damages were never sought from the Commonwealth and could not have been awarded against it;[20] respondents cannot reach this same end simply by suing state officials in their official capacity. Nor did respondents' action on the merits become a suit against Kentucky when the Commonwealth was named a defendant on the limited issue of fee liability. There is no cause of action against a defendant for fees absent that defendant's liability for relief on the merits. See *supra*, at 167–168. Naming the Commonwealth for fees did not create, out of whole cloth, the cause of action on the merits necessary to support this fee request. Thus, no claim for merits relief capable of being asserted in federal court was asserted against the Commonwealth of Kentucky. In the absence of such a claim, the fee award against the Commonwealth must be reversed.

IV

Despite the Court of Appeals' contrary view, the result we reach today is fully consistent with *Hutto* v. *Finney*, 437 U. S. 678 (1978). *Hutto* holds only that, when a State in a § 1983 action has been prevailed against for relief on the merits, either because the State was a proper party defendant or because state officials properly were sued in their official capacity, fees may also be available from the State under § 1988. *Hutto* does not alter the basic philosophy of

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[19] No argument has been made that the Commonwealth waived its Eleventh Amendment immunity by failing specifically to seek dismissal of that portion of the damages action that named Commissioner Brandenburgh in his official capacity. Nor is the Commonwealth alleged to have done so by allowing him to enter the settlement agreement; the Commonwealth did not even have notice of the settlement negotiations.

[20] Brief for Respondents 17; Tr. of Oral Arg. 18.

§ 1988, namely, that fee and merits liability run together. As a result, *Hutto* neither holds nor suggests that fees are available from a governmental entity simply because a government official has been prevailed against in his or her personal capacity.

Respondents vigorously protest that this holding will "effectively destro[y]" § 1988 in cases such as this one. Brief for Respondents 19. This fear is overstated. Fees are unavailable only where a governmental entity cannot be held liable on the merits; today we simply apply the fee-shifting provisions of § 1988 against a pre-existing background of substantive liability rules.

V

Only in an official-capacity action is a plaintiff who prevails entitled to look for relief, both on the merits and for fees, to the governmental entity. Because the Court's Eleventh Amendment decisions required this case to be litigated as a personal-capacity action, the award of fees against the Commonwealth of Kentucky must be reversed.

It is so ordered.

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION ET AL. *v.* HAMILTON BANK OF JOHNSON CITY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-4. Argued February 19, 1985—Decided June 28, 1985

As required under Tennessee law, in 1973 respondent's predecessor in interest, a land developer, obtained petitioner Planning Commission's approval of a preliminary plat for development of a tract. The tract was to be developed in accord with the requirements of a county zoning ordinance for "cluster" development of residential areas and the Commission's implementing regulations. In 1977, the county zoning ordinance was changed so as to reduce the allowable density of dwelling units, but the Commission continued to apply the 1973 ordinance and regulations to the developer's tract. In 1979, however, the Commission decided that further development of the tract should be governed by the ordinance and regulations then in effect. The Commission thereafter disapproved plats proposing further development of the remainder of the tract on various grounds, including failure to comply with current density requirements. Respondent filed suit against the Commission and its members and staff (also petitioners) in Federal District Court pursuant to 42 U. S. C. § 1983, alleging that the Commission had taken its property without just compensation by refusing to approve the proposed development. The jury found that respondent had been denied the "economically viable" use of its property in violation of the Just Compensation Clause of the Fifth Amendment, and awarded damages for the temporary taking of respondent's property. The District Court entered an injunction requiring the Commission to apply the 1973 ordinance and regulations to the project, but granted judgment notwithstanding the jury's verdict for the Commission on the taking claim, concluding that the temporary deprivation of economic benefit from respondent's property, as a matter of law, could not constitute a taking. The Court of Appeals reversed, holding that application of government regulations affecting an owner's use of property may constitute a taking, and that the evidence supported the jury's finding that the property had no economically feasible use during the time between the Commission's refusal to approve the plat and the jury's verdict.

Held:

1. Even assuming, *arguendo*, that government regulation may effect a taking for which the Fifth Amendment requires just compensation,

and assuming further that the Fifth Amendment requires the payment of money damages to compensate for such a taking, the jury verdict in this case cannot be upheld because respondent's claim is premature. Respondent has not yet obtained a final decision regarding the application of the ordinance and regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, and its claim therefore is not ripe. Pp. 186–197.

(a) Although respondent's plan for developing its property was rejected, it did not then seek variances that would have allowed it to develop the property according to its proposed plat. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264. The record does not support respondent's claim that the Commission's denial of approval for respondent's plat was equivalent to a denial of variances. Thus, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Respondent's contention that it should not be required to seek variances because its suit is predicated upon 42 U. S. C. § 1983 is without merit. While there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action, the question whether administrative remedies must be exhausted is conceptually distinct from the question whether an administrative action must be final before it is judicially reviewable. Pp. 186–194.

(b) The Fifth Amendment does not require that just compensation be paid in advance of, or contemporaneously with, the taking. If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature. Pp. 194–197.

2. Respondent's claim also is premature if viewed under the theory that government regulation that goes so far that it has the same effect as a physical taking, must be viewed not as a Fifth Amendment "taking," but as an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment. Resolution of the due process question depends, in significant part, upon an analysis of the effect the Commission's application of the ordinance and regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its § 1983 action,

because respondent failed to apply for variances from the regulations. Pp. 197–200.

729 F. 2d 402, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 201. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 202. WHITE, J., filed a dissenting statement, *post*, p. 200. POWELL, J., took no part in the decision of the case.

Robert L. Estes argued the cause for petitioners. With him on the brief was *M. Milton Sweeney*.

Edwin S. Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Claiborne*, and *David C. Shilton*.

G. T. Nebel argued the cause for respondent. With him on the brief was *Gus Bauman*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California ex rel. John K. Van de Kamp, Attorney General of California, et al. by Mr. Van de Kamp, *pro se*, *N. Gregory Taylor* and *Theodora Berger*, Assistant Attorneys General of California, *Richard C. Jacobs*, *Craig C. Thompson*, *Richard M. Frank*, *Norman C. Gorsuch*, Attorney General of Alaska, *Jim Smith*, Attorney General of Florida, *Thomas J. Miller*, Attorney General of Iowa, *Francis X. Bellotti*, Attorney General of Massachusetts, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Paul L. Douglas*, Attorney General of Nebraska, *Brian McKay*, Attorney General of Nevada, *George V. Postrozny*, Deputy Attorney General, *Gregory H. Smith*, Attorney General of New Hampshire, *T. Travis Medlock*, Attorney General of South Carolina, *Jim Mattox*, Attorney General of Texas, *Rufus L. Edmisten*, Attorney General of North Carolina, *Michael Turpen*, Attorney General of Oklahoma, *Robert L. McDonald*, First Assistant Attorney General, *Mark V. Meierhenry*, Attorney General of South Dakota, *David L. Wilkinson*, Attorney General of Utah, *Dallis W. Jensen*, Solicitor General, *John J. Easton*, Attorney General of Vermont, *Bronson C. La Follette*, Attorney General of Wisconsin, *Archie G. McClintock*, Attorney General of Wyoming, *Aviata F. Fa'Alevao*, Attorney General of American Samoa; for the National Association of Counties et al. by *Lawrence R. Velvel* and *Joyce Holmes Benjamin;* for the City of New

JUSTICE BLACKMUN delivered the opinion of the Court.

Respondent, the owner of a tract of land it was developing as a residential subdivision, sued petitioners, the Williamson County (Tennessee) Regional Planning Commission and its members and staff, in United States District Court, alleging that petitioners' application of various zoning laws and regulations to respondent's property amounted to a "taking" of that property. At trial, the jury agreed and awarded respondent $350,000 as just compensation for the "taking." Although the jury's verdict was rejected by the District Court, which granted a judgment notwithstanding the verdict to petitioners, the verdict was reinstated on appeal. Petitioners and their *amici* urge this Court to overturn the jury's award on the ground that a temporary regulatory interference with an investor's profit expectation does not constitute a "taking" within the meaning of the Just Compensation Clause of the Fifth Amendment,[1] or, alternatively, on the ground that even if such interference does constitute a taking, the Just Compensation Clause does not require money damages as recompense. Before we reach those con-

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York by *Frederick A. O. Schwarz, Jr.*, and *Leonard Koerner;* and for the City of St. Petersburg, Florida, by *Charles L. Siemon, Wendy U. Larsen,* and *Michael S. Davis.*

Briefs of *amici curiae* urging affirmance were filed for the American College of Real Estate Lawyers by *Edward I. Cutler, Eugene J. Morris,* and *John P. Trevaskis, Jr.;* for the California Building Industry Association by *Gideon Kanner;* for the National Apartment Association by *Jon D. Smock* and *Wilbur H. Haines III;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Robert K. Best.*

Morris A. Thurston, Robert K. Break, and *John L. Fellows III* filed a brief for Irvine Co. as *amicus curiae.*

[1] "[N]or shall private property be taken for public use, without just compensation."

The Fifth Amendment's prohibition, of course, applies against the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 241 (1897); see also *San Diego Gas & Electric Co.* v. *San Diego,* 450 U. S. 621, 623, n. 1 (1981).

tentions, we examine the procedural posture of respondent's claim.

I

A

Under Tennessee law, responsibility for land-use planning is divided between the legislative body of each of the State's counties and regional and municipal "planning commissions." The county legislative body is responsible for zoning ordinances to regulate the uses to which particular land and buildings may be put, and to control the density of population and the location and dimensions of buildings. Tenn. Code Ann. § 13–7–101 (1980). The planning commissions are responsible for more specific regulations governing the subdivision of land within their region or municipality for residential development. §§ 13–3–403, 13–4–303. Enforcement of both the zoning ordinances and the subdivision regulations is accomplished in part through a requirement that the planning commission approve the plat of a subdivision before the plat may be recorded. §§ 13–3–402, 13–4–302 (1980 and Supp. 1984).

Pursuant to § 13–7–101, the Williamson County "Quarterly Court," which is the county's legislative body, in 1973 adopted a zoning ordinance that allowed "cluster" development of residential areas. Under "cluster" zoning,

> "both the size and the width of individual residential lots in . . . [a] development may be reduced, provided . . . that the overall density of the entire tract remains constant—provided, that is, that an area equivalent to the total of the areas thus 'saved' from each individual lot is pooled and retained as common open space." 2 N. Williams, American Land Planning Law § 47.01, pp. 212–213 (1974).

Cluster zoning thus allows housing units to be grouped, or "clustered" together, rather than being evenly spaced on uniform lots.

As required by § 13–3–402, respondent's predecessor-in-interest (developer) in 1973 submitted a preliminary plat for the cluster development of its tract, the Temple Hills Country Club Estates (Temple Hills), to the Williamson County Regional Planning Commission for approval. At that time, the county's zoning ordinance and the Commission's subdivision regulations required developers to seek review and approval of subdivision plats in two steps. The developer first was to submit for approval a preliminary plat, or "initial sketch plan," indicating, among other things, the boundaries and acreage of the site, the number of dwelling units and their basic design, the location of existing and proposed roads, structures, lots, utility layouts, and open space, and the contour of the land. App. in No. 82–5388 (CA6), pp. 857, 871 (CA App.). Once approved, the preliminary plat served as a basis for the preparation of a final plat. Under the Commission's regulations, however, approval of a preliminary plat "will not constitute acceptance of the final plat." *Id.*, at 872. Approval of a preliminary plat lapsed if a final plat was not submitted within one year of the date of the approval, unless the Commission granted an extension of time, or unless the approval of the preliminary plat was renewed. *Ibid.* The final plat, which is the official authenticated document that is recorded, was required to conform substantially to the preliminary plat, and, in addition, to include such details as the lines of all streets, lots, boundaries, and building setbacks. *Id.*, at 875.

On May 3, 1973, the Commission approved the developer's preliminary plat for Temple Hills. App. 246–247. The plat indicated that the development was to include 676 acres, of which 260 acres would be open space, primarily in the form of a golf course. *Id.*, at 422. A notation on the plat indicated that the number of "allowable dwelling units for total development" was 736, but lot lines were drawn in for only 469 units. The areas in which the remaining 276 units were to be placed were left blank and bore the notation "this parcel not to be developed until approved by the planning commission."

The plat also contained a disclaimer that "parcels with note 'this parcel not to be developed until approved by the planning commission' not a part of this plat and not included in gross area." *Ibid.* The density of 736 allowable dwelling units was calculated by multiplying the number of acres (676) by the number of units allowed per acre (1.089). *Id.*, at 361. Although the zoning regulations in effect in 1973 required that density be calculated "on the basis of total acreage less fifty percent (50%) of the land lying in the flood plain . . . and less fifty percent (50%) of all land lying on a slope with a grade in excess of twenty-five percent (25%)," CA App. 858, no deduction was made from the 676 acres for such land. Tr. 369.

Upon approval of the preliminary plat, the developer conveyed to the county a permanent open space easement for the golf course, and began building roads and installing utility lines for the project. App. 259–260. The developer spent approximately $3 million building the golf course, and another $500,000 installing sewer and water facilities. Defendant's Ex. 96. Before housing construction was to begin on a particular section, a final plat of that section was submitted for approval. Several sections, containing a total of 212 units, were given final approval by 1979. App. 260, 270, 278, 423. The preliminary plat, as well, was reapproved four times during that period. *Id.*, at 270, 274, 362, 423.

In 1977, the county changed its zoning ordinance to require that calculations of allowable density exclude 10% of the total acreage to account for roads and utilities. *Id.*, at 363; CA App. 862. In addition, the number of allowable units was changed to one per acre from the 1.089 per acre allowed in 1973. *Id.*, at 858, 862; Tr. 1169–1170, 1183. The Commission continued to apply the zoning ordinance and subdivision regulations in effect in 1973 to Temple Hills, however, and reapproved the preliminary plat in 1978. In August 1979, the Commission reversed its position and decided that plats submitted for renewal should be evaluated under the zoning

ordinance and subdivision regulations in effect when the renewal was sought. App. 279–282. The Commission then renewed the Temple Hills plat under the ordinances and regulations in effect at that time. *Id.*, at 283–284.

In January 1980, the Commission asked the developer to submit a revised preliminary plat before it sought final approval for the remaining sections of the subdivision. The Commission reasoned that this was necessary because the original preliminary plat contained a number of surveying errors, the land available in the subdivision had been decreased inasmuch as the State had condemned part of the land for a parkway, and the areas marked "reserved for future development" had never been platted. Plaintiff's Exs. 1078 and 1079; Tr. 164–168. A special committee (Temple Hills Committee) was appointed to work with the developer on the revision of the preliminary plat. Plaintiff's Ex. 1081; Tr. 169–170.

The developer submitted a revised preliminary plat for approval in October 1980.[2] Upon review, the Commission's staff and the Temple Hills Committee noted several problems with the revised plat. App. 304–305. First, the allowable density under the zoning ordinance and subdivision regulations then in effect was 548 units, rather than the 736 units claimed under the preliminary plat approved in 1973. The difference reflected a decrease in 18.5 acres for the parkway, a decrease of 66 acres for the 10% deduction for roads, and an exclusion of 44 acres for 50% of the land lying on slopes exceeding a 25% grade. Second, two cul-de-sac roads that had become necessary because of the land taken for the parkway exceeded the maximum length allowed for such roads under the subdivision regulations in effect in both 1980 and 1973.

[2]The developer also submitted the preliminary plat that had been approved in 1973 and reapproved on several subsequent occasions, contending that it had the right to develop the property according to that plat. As we have noted, that plat did not indicate how all of the parcels would be developed. App. 84–85.

Third, approximately 2,000 feet of road would have grades in excess of the maximum allowed by county road regulations. Fourth, the preliminary plat placed units on land that had grades in excess of 25% and thus was considered undevelopable under the zoning ordinance and subdivision regulations. Fifth, the developer had not fulfilled its obligations regarding the construction and maintenance of the main access road. Sixth, there were inadequate fire protection services for the area, as well as inadequate open space for children's recreational activities. Finally, the lots proposed in the preliminary plat had a road frontage that was below the minimum required by the subdivision regulations in effect in 1980.

The Temple Hills Committee recommended that the Commission grant a waiver of the regulations regarding the length of the cul-de-sacs, the maximum grade of the roads, and the minimum frontage requirement. *Id.*, at 297, 304–306. Without addressing the suggestion that those three requirements be waived, the Commission disapproved the plat on two other grounds: first, the plat did not comply with the density requirements of the zoning ordinance or subdivision regulations, because no deduction had been made for the land taken for the parkway, and because there had been no deduction for 10% of the acreage attributable to roads or for 50% of the land having a slope of more than 25%; and second, lots were placed on slopes with a grade greater than 25%. Plaintiff's Ex. 9112.

The developer then appealed to the County Board of Zoning Appeals for an "interpretation of the Residential Cluster zoning [ordinance] as it relates to Temple Hills."[3] App. 314.

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[3] The Board of Zoning Appeals was empowered:

"a. To hear and decide appeals on any permit, decision, determination, or refusal made by the [County] Building Commissioner or other administrative official in the carrying out or enforcement of any provision of this Resolution; and to interpret the Zoning map and this Resolution.

. . . . .

"c. To hear and decide applications for variances from the terms of this Resolution. Such variances shall be granted only where by reason of ex-

On November 11, 1980, the Board determined that the Commission should apply the zoning ordinance and subdivision regulations that were in effect in 1973 in evaluating the density of Temple Hills. *Id.*, at 328. It also decided that in measuring which lots had excessive grades, the Commission should define the slope in a manner more favorable to the developer. *Id.*, at 329.

On November 26, respondent, Hamilton Bank of Johnson City, acquired through foreclosure the property in the Temple Hills subdivision that had not yet been developed, a total of 257.65 acres. *Id.*, at 189–190. This included many of the parcels that had been left blank in the preliminary plat approved in 1973. In June 1981, respondent submitted two preliminary plats to the Commission—the plat that had been approved in 1973 and subsequently reapproved several times, and a plat indicating respondent's plans for the undeveloped areas, which was similar to the plat submitted by the developer in 1980. *Id.*, at 88. The new plat proposed the development of 688 units; the reduction from 736 units represented respondent's concession that 18.5 acres should be removed from the acreage because that land had been taken for the parkway. *Id.*, at 424, 425.

On June 18, the Commission disapproved the plat for eight reasons, including the density and grade problems cited in the October 1980 denial, as well as the objections the Temple Hills Committee had raised in 1980 to the length of two cul-de-sacs, the grade of various roads, the lack of fire protection, the disrepair of the main-access road, and the minimum frontage. *Id.*, at 370. The Commission declined to follow the decision of the Board of Zoning Appeals that the plat

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ceptional narrowness, shallowness, or shape of a specific piece of property which at the time of adoption of this Resolution was a lot of record, or where by reason of exceptional topographic situations or conditions of a piece of property the strict application of the provisions of this Resolution would result in practical difficulties to or undue hardship upon the owner of such property." Plaintiff's Ex. 9112.

See also Tenn. Code. Ann. §§ 13–7–106 to 13–7–109 (1980).

should be evaluated by the 1973 zoning ordinance and subdivision regulations, stating that the Board lacked jurisdiction to hear appeals from the Commission. *Id.*, at 187–188, 360–361.

B

Respondent then filed this suit in the United States District Court for the Middle District of Tennessee, pursuant to 42 U. S. C. § 1983, alleging that the Commission had taken its property without just compensation and asserting that the Commission should be estopped under state law from denying approval of the project.[4] Respondent's expert witnesses testified that the design that would meet each of the Commission's eight objections would allow respondent to build only 67 units, 409 fewer than respondent claims it is entitled to build,[5] and that the development of only 67 sites would result in a net loss of over $1 million. App. 377. Petitioners' expert witness, on the other hand, testified that the Commission's eight objections could be overcome by a design that would allow development of approximately 300 units. Tr. 1467–1468.

After a 3-week trial, the jury found that respondent had been denied the "economically viable" use of its property in violation of the Just Compensation Clause, and that the Commission was estopped under state law from requiring respondent to comply with the current zoning ordinance and

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[4] Respondent also alleged that the Commission's refusal to approve the plat violated respondent's rights to substantive and procedural due process and denied it equal protection. The District Court granted a directed verdict to petitioners on the substantive due process and equal protection claims, and the jury found that respondent had not been denied procedural due process. App. 32. Those issues are not before us.

[5] *Id.*, at 377; Tr. 238–243. Respondent claimed it was entitled to build 476 units: the 736 units allegedly approved in 1973 minus the 212 units already built or given final approval and minus 48 units that were no longer available because land had been taken from the subdivision for the parkway.

subdivision regulations rather than those in effect in 1973. App. 32–33. The jury awarded damages of $350,000 for the temporary taking of respondent's property. *Id.*, at 33–34.[6] The court entered a permanent injunction requiring the Commission to apply the zoning ordinance and subdivision regulations in effect in 1973 to Temple Hills, and to approve the plat submitted in 1981. *Id.*, at 34.

The court then granted judgment notwithstanding the verdict in favor of the Commission on the taking claim, reasoning in part that respondent was unable to derive economic benefit from its property on a temporary basis only, and that such a temporary deprivation, as a matter of law, cannot constitute a taking. *Id.*, at 36, 41. In addition, the court modified its permanent injunction to require the Commission merely to apply the zoning ordinance and subdivision regulations in effect in 1973 to the project, rather than requiring approval of the plat, in order to allow the parties to resolve "legitimate technical questions of whether plaintiff meets the requirements of the 1973 regulations," *id.*, at 42, through the applicable state and local appeals procedures.[7]

A divided panel of the United States Court of Appeals for the Sixth Circuit reversed. 729 F. 2d 402 (1984). The court

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[6] Although the record is less than clear, it appears that the jury calculated the $350,000 award by determining a fair rate of return on the value of the property for the time between the Commission's rejection of the preliminary plat in 1980 and the jury's verdict in March 1982. See *id.*, at 800–805; Tr. of Oral Arg. 25, 32–33. In light of our disposition of the case, we need not reach the question whether that measure of damages would provide just compensation, or whether it would be appropriate if respondent's cause of action were viewed as stating a claim under the Due Process Clause.

[7] While respondent's appeal was pending before the Court of Appeals, the parties reached an agreement whereby the Commission granted a variance from its cul-de-sac and road-grade regulations and approved the development of 476 units, and respondent agreed, among other things, to rebuild existing roads, and build all new roads, according to current regulations. App. to Brief for Petitioners 35.

held that application of government regulations affecting an owner's use of property may constitute a taking if the regulation denies the owner all "economically viable" use of the land, and that the evidence supported the jury's finding that the property had no economically feasible use during the time between the Commission's refusal to approve the preliminary plat and the jury's verdict. *Id.*, at 405–406. Rejecting petitioners' argument that respondent never had submitted a plat that complied with the 1973 regulations, and thus never had acquired rights that could be taken, the court held that the jury's estoppel verdict indicates that the jury must have found that respondent had acquired a "vested right" under state law to develop the subdivision according to the plat submitted in 1973. *Id.*, at 407. Even if respondent had no vested right under state law to finish the development, the jury was entitled to find that respondent had a reasonable investment-backed expectation that the development could be completed, and that the actions of the Commission interfered with that expectation. *Ibid.*

The court rejected the District Court's holding that the taking verdict could not stand as a matter of law. A temporary denial of property could be a taking, and was to be analyzed in the same manner as a permanent taking. Finally, relying upon the dissent in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 636 (1981), the court determined that damages are required to compensate for a temporary taking.[8]

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[8] Judge Wellford dissented. 729 F. 2d, at 409. He did not agree that the evidence supported a finding that respondent's property had been taken, in part because there was no evidence that respondent had formally requested a variance from the regulations. Even if there was a temporary denial of the "economically viable" use of the property, Judge Wellford would have held that mere fluctuations in value during the process of governmental decisionmaking are "'incidents of ownership'" and cannot be considered a "'taking,'" *id.*, at 410, quoting *Agins* v. *Tiburon*, 447 U. S. 255, 263, n. 9 (1980). He also did not agree that damages could be awarded to remedy any taking, reasoning that the *San Diego Gas* dissent

II

We granted certiorari to address the question whether Federal, State, and local Governments must pay money damages to a landowner whose property allegedly has been "taken" temporarily by the application of government regulations. 469 U. S. 815 (1984). Petitioners and their *amici* contend that we should answer the question in the negative by ruling that government regulation can never effect a "taking" within the meaning of the Fifth Amendment. They recognize that government regulation may be so restrictive that it denies a property owner all reasonable beneficial use of its property, and thus has the same effect as an appropriation of the property for public use, which concededly would be a taking under the Fifth Amendment. According to petitioners, however, regulation that has such an effect should not be viewed as a taking. Instead, such regulation should be viewed as a violation of the Fourteenth Amendment's Due Process Clause, because it is an attempt by government to use its police power to effect a result that is so unduly oppressive to the property owner that it constitutionally can be effected only through the power of eminent domain. Violations of the Due Process Clause, petitioners' argument concludes, need not be remedied by "just compensation."

The Court twice has left this issue undecided. *San Diego Gas & Electric Co.* v. *San Diego*, *supra*; *Agins* v. *Tiburon*, 447 U. S. 255, 263 (1980). Once again, we find that the question is not properly presented, and must be left for another day. For whether we examine the Planning Commission's application of its regulations under Fifth Amendment "taking" jurisprudence, or under the precept of due process, we conclude that respondent's claim is premature.

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does not reflect the views of the majority of this Court, and that this Court never has awarded damages for a temporary taking where there was no invasion, physical occupation, or "seizure and direction" by the State of the landowner's property. 729 F. 2d, at 411.

III

We examine the posture of respondent's cause of action first by viewing it as stating a claim under the Just Compensation Clause. This Court often has referred to regulation that "goes too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922), as a "taking." See, *e. g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1004–1005 (1984); *Agins* v. *Tiburon*, 447 U. S., at 260; *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 83 (1980); *Kaiser Aetna* v. *United States*, 444 U. S. 164, 174 (1979); *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979); *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124 (1978); *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594 (1962); *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958). Even assuming that those decisions meant to refer literally to the Taking Clause of the Fifth Amendment, and therefore stand for the proposition that regulation may effect a taking for which the Fifth Amendment requires just compensation, see *San Diego*, 450 U. S., at 647–653 (dissenting opinion), and even assuming further that the Fifth Amendment requires the payment of money damages to compensate for such a taking, the jury verdict in this case cannot be upheld. Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe.

A

As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. In *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264

(1981), for example, the Court rejected a claim that the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U. S. C. § 1201 *et seq.*, effected a taking because:

> "There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement of § 515(d) or a waiver from the surface mining restrictions in § 522(e). If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution." 452 U. S., at 297 (footnote omitted).

Similarly, in *Agins* v. *Tiburon*, *supra*, the Court held that a challenge to the application of a zoning ordinance was not ripe because the property owners had not yet submitted a plan for development of their property. 447 U. S., at 260. In *Penn Central Transp. Co.* v. *New York City*, *supra*, the Court declined to find that the application of New York City's Landmarks Preservation Law to Grand Central Terminal effected a taking because, although the Landmarks Preservation Commission had disapproved a plan for a 50-story office building above the terminal, the property owners had not sought approval for any other plan, and it therefore was not clear whether the Commission would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property. 438 U. S., at 136–137.

Respondent's claim is in a posture similar to the claims the Court held premature in *Hodel*. Respondent has submitted a plan for developing its property, and thus has passed beyond the *Agins* threshold. But, like the *Hodel* plaintiffs,

respondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations. It appears that variances could have been granted to resolve at least five of the Commission's eight objections to the plat. The Board of Zoning Appeals had the power to grant certain variances from the zoning ordinance, including the ordinance's density requirements and its restriction on placing units on land with slopes having a grade in excess of 25%. Tr. 1204–1205; see n. 3, *supra*. The Commission had the power to grant variances from the subdivision regulations, including the cul-de-sac, road-grade, and frontage requirements.[9] Indeed, the Temple Hills Committee had recommended that the Commission grant variances from those regulations. App. 304–306. Nevertheless, respondent did not seek variances from either the Board or the Commission.

Respondent argues that it "did everything possible to resolve the conflict with the commission," Brief for Respondent 42, and that the Commission's denial of approval for respondent's plat was equivalent to a denial of variances. The record does not support respondent's claim, however. There is no evidence that respondent applied to the Board of Zoning Appeals for variances from the zoning ordinance. As noted, the developer sought a ruling that the ordinance in effect in 1973 should be applied, but neither respondent nor the devel-

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[9] The subdivision regulations in effect in 1980 and 1981 provided:

"Variances may be granted under the following conditions:

"Where the subdivider can show that strict adherence to these regulations would cause unnecessary hardship, due to conditions beyond the control of the subdivider. If the subdivider creates the hardship due to his design or in an effort to increase the yield of lots in his subdivision, the variance will not be granted.

"Where the Planning Commission decides that there are topographical or other conditions peculiar to the site, and a departure from their regulations will not destroy their intent." CA App. 932.

oper sought a variance from the requirements of either the 1973 or 1980 ordinances. Further, although the subdivision regulations in effect in 1981 required that applications to the Commission for variances be in writing, and that notice of the application be given to owners of adjacent property,[10] the record contains no evidence that respondent ever filed a written request for variances from the cul-de-sac, road-grade, or frontage requirements of the subdivision regulations, or that respondent ever gave the required notice.[11] App. 212–213; see also Tr. 1255–1257.

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[10] The Commission's regulations required that

"Each applicant must file with the Planning Commission a written request for variance stating at least the following:

"a. The variance requested.

"b. Reason or circumstances requiring the variance.

"c. Notice to the adjacent property owners that a variance is being requested.

"Without the application any condition shown on the plat which would require a variance will constitute grounds for disapproval of the plat." *Id.*, at 933.

[11] Respondent's predecessor-in-interest requested, and apparently was granted, a waiver of the 10% road-grade regulation for section VI of the subdivision. See Plaintiff's Exs. 1078, 9094. The predecessor-in-interest wrote a letter on January 3, 1980, that respondent contends must be construed as a request for a waiver of the road-grade regulation for the entire subdivision:

"I contend that the road grade and slope question . . . is adequately provided for by both the [subdivision] Regulations and the Zoning Ordinance. In both, the Planning Commission is given the authority to approve roads that have grades in excess of 10%.

"In our particular case, it was common knowledge from the beginning that due to the character of the land involved that there would be roads that exceeded the 10% slope. In fact in our first Section there is a stretch of road that exceeds the 10%; therefore I respectfully request that this letter be made an official part of the Planning Commission Minutes of January 3, 1980 and further the Zoning Approval which has been granted be allowed to stand without any changes." Defendants' Ex. 96.

Even assuming, *arguendo*, that the letter constituted a request for a variance, respondent's taking claim nevertheless is not ripe. There is no evidence that respondent requested variances from the regulations that

Indeed, in a letter to the Commission written shortly before its June 18, 1981, meeting to consider the preliminary sketch, respondent took the position that it would not request variances from the Commission until *after* the Commission approved the proposed plat:

> "[Respondent] stands ready to work with the Planning Commission concerning the necessary variances. Until the initial sketch is renewed, however, and the developer has an opportunity to do detailed engineering work it is impossible to determine the exact nature of any variances that may be needed." Plaintiff's Ex. 9028, p. 6.

The Commission's regulations clearly indicated that unless a developer applied for a variance in writing and upon notice to other property owners, "any condition shown on the plat which would require a variance will constitute grounds for disapproval of the plat." CA App. 933. Thus, in the face of respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted.

As in *Hodel*, *Agins*, and *Penn Central*, then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty,"

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formed the basis of the other objections raised by the Commission, such as those regulating the length of cul-de-sacs. Absent a final decision regarding the application of *all* eight of the Commission's objections, it is impossible to tell whether the land retained any reasonable beneficial use or whether respondent's expectation interests had been destroyed.

Penn Central Transp. Co. v. *New York City*, 438 U. S., at 123, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. *Id.*, at 124. See also *Ruckelshaus* v. *Monsanto Co.*, 467 U. S., at 1005; *PruneYard Shopping Center* v. *Robins*, 447 U. S., at 83; *Kaiser Aetna* v. *United States*, 444 U. S., at 175. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Here, for example, the jury's verdict indicates only that it found that respondent would be denied the economically feasible use of its property if it were forced to develop the subdivision in a manner that would meet each of the Commission's eight objections. It is not clear whether the jury would have found that the respondent had been denied all reasonable beneficial use of the property had any of the eight objections been met through the grant of a variance. Indeed, the expert witness who testified regarding the economic impact of the Commission's actions did not itemize the effect of each of the eight objections, so the jury would have been unable to discern how a grant of a variance from any one of the regulations at issue would have affected the profitability of the development. App. 377; see also *id.*, at 102–104. Accordingly, until the Commission determines that no variances will be granted, it is impossible for the jury to find, on this record, whether respondent "will be unable to derive economic benefit" from the land.[12]

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[12] The District Court's instructions allowed the jury to find a taking if it ascertained that "the regulations in question as applied to [respondent's] property denied [respondent] economically viable use of its property." Tr. 2016. That instruction seems to assume that respondent's taking theory was simply that its property was rendered valueless by the application of new zoning laws and subdivision regulations in 1980. The record indi-

Respondent asserts that it should not be required to seek variances from the regulations because its suit is predicated upon 42 U. S. C. § 1983, and there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action. *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982). The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. See *FTC* v. *Standard Oil Co.*, 449 U. S. 232, 243 (1980); *Bethlehem Steel Corp.* v. *EPA*, 669 F. 2d 903, 908 (CA3 1982). See generally 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and

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cates, however, that respondent's claim was based upon a state-law theory of "vested rights," and that the alleged "taking" was the Commission's interference with respondent's "expectation interest" in completing the development according to its original plans. The evidence that it was not economically feasible to develop just the 67 units respondent claims the Commission's actions would limit it to developing was based upon the cost of building the development according to the original plan. The expected income from the sale of the 67 units apparently was measured against the cost of the 27-hole golf course and the cost of installing water and sewer connections for a large development that would not have had to have been installed for a development of only 67 units. App. 191–197; Tr. 690; see also *id.*, at 2154–2155. Thus, the evidence appears to indicate that it would not be profitable to develop 67 units because respondent had made various expenditures in the expectation that the development would contain far more units; the evidence does not appear to support the proposition that, aside from those "reliance" expenditures, development of 67 units on the property would not be economically feasible.

We express no view of the propriety of applying the "economic viability" test when the taking claim is based upon such a theory of "vested rights" or "expectation interest." Cf. *Andrus* v. *Allard*, 444 U. S. 51, 66 (1979) (analyzing a claim that Government regulations effected a taking by reducing expected profits). It is sufficient for our purposes to note that whether the "property" taken is viewed as the land itself or respondent's expectation interest in developing the land as it wished, it is impossible to determine the extent of the loss or interference until the Commission has decided whether it will grant a variance from the application of the regulations.

Procedure § 3532.6 (1984). While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Patsy* concerned the latter, not the former.

The difference is best illustrated by comparing the procedure for seeking a variance with the procedures that, under *Patsy*, respondent would not be required to exhaust. While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, see *Fallin* v. *Knox County Bd. of Comm'rs*, 656 S. W. 2d 338 (Tenn. 1983); Tenn. Code Ann. §§ 27–8–101, 27–9–101 to 27–9–113, and 29–14–101 to 29–14–113 (1980 and Supp. 1984), respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are remedial. Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking.

Resort to those procedures would result in a judgment whether the Commission's actions violated any of respondent's rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent

may develop the subdivision according to its plat after obtaining the variances. In short, the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.

B

A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so.[13] The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S., at 297, n. 40. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "'reasonable, certain and adequate provision for obtaining compensation'" exist at the time of the taking. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 124–125 (1974) (quoting *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 659 (1890)). See also *Ruckelshaus* v. *Monsanto Co.*, 467 U. S., at 1016; *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 21 (1940); *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932). If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against

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[13] Again, it is necessary to contrast the procedures provided for review of the Commission's actions, such as those for obtaining a declaratory judgment, see Tenn. Code Ann. §§ 29–14–101 to 29–14–113 (1980), with procedures that allow a property owner to obtain compensation for a taking. Exhaustion of review procedures is not required. See *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982). As we have explained, however, because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

the Government" for a taking. *Monsanto*, 467 U. S., at 1013, 1018, n. 21. Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U. S. C. § 1491. *Monsanto*, 467 U. S., at 1016–1020. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

The recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation is analogous to the Court's holding in *Parratt* v. *Taylor*, 451 U. S. 527 (1981). There, the Court ruled that a person deprived of property through a random and unauthorized act by a state employee does not state a claim under the Due Process Clause merely by alleging the deprivation of property. In such a situation, the Constitution does not require predeprivation process because it would be impossible or impracticable to provide a meaningful hearing before the deprivation. Instead, the Constitution is satisfied by the provision of meaningful postdeprivation process. Thus, the State's action is not "complete" in the sense of causing a constitutional injury "unless or until the state fails to provide an adequate postdeprivation remedy for the property loss." *Hudson* v. *Palmer*, 468 U. S. 517, 532, n. 12 (1984). Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.[14]

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[14] The analogy to *Parratt* is imperfect because *Parratt* does not extend to situations such as those involved in *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982), in which the deprivation of property is effected pursu-

Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. Tenn. Code Ann. § 29–16–123 (1980). The statutory scheme for eminent domain proceedings outlines the procedures by which government entities must exercise the right of eminent domain. §§ 29–16–101 to 29–16–121. The State is prohibited from "enter[ing] upon [condemned] land" until these procedures have been utilized and compensation has been paid the owner, § 29–16–122, but if a government entity does take possession of the land without following the required procedures,

> "the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way . . . ." § 29–16–123.

The Tennessee state courts have interpreted § 29–16–123 to allow recovery through inverse condemnation where the "taking" is effected by restrictive zoning laws or development regulations. See *Davis* v. *Metropolitan Govt. of Nashville*, 620 S. W. 2d 532, 533–534 (Tenn. App. 1981); *Speight* v. *Lockhart*, 524 S. W. 2d 249 (Tenn. App. 1975). Respondent

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ant to an established state policy or procedure, and the State could provide predeprivation process. Unlike the Due Process Clause, however, the Just Compensation Clause has never been held to require pretaking process or compensation. *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1016 (1984). Nor has the Court ever recognized any interest served by pretaking compensation that could not be equally well served by post-taking compensation. Under the Due Process Clause, on the other hand, the Court has recognized that predeprivation process is of "obvious value in reaching an accurate decision," that the "only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the [deprivation] takes effect," *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532, 543 (1985), and that predeprivation process may serve the purpose of making an individual feel that the government has dealt with him fairly. See *Carey* v. *Piphus*, 435 U. S. 247, 262 (1978). Thus, despite the Court's holding in *Logan*, *Parratt*'s reasoning applies here by analogy because of the special nature of the Just Compensation Clause.

has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.

IV

We turn to an analysis of respondent's claim under the due process theory that petitioners espouse. As noted, under that theory government regulation does not effect a taking for which the Fifth Amendment requires just compensation; instead, regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment. Should the government wish to accomplish the goals of such regulation, it must proceed through the exercise of its eminent domain power, and, of course, pay just compensation for any property taken. The remedy for a regulation that goes too far, under the due process theory, is not "just compensation," but invalidation of the regulation, and if authorized and appropriate, actual damages.[15]

The notion that excessive regulation can constitute a "taking" under the Just Compensation Clause stems from language in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393

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[15] See generally F. Bosselman, D. Callies, & J. Banta, The Taking Issue 238–255 (1973); Sterk, Government Liability for Unconstitutional Land Use Regulation, 60 Ind. L. J. 113 (1984); Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash. L. Rev. 583 (1981); Stoebuck, Police Power, Takings, and Due Process, 37 Wash. & Lee L. Rev. 1057 (1980); Comment, Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis, 57 Wash. L. Rev. 715 (1982); Comment, Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations, 29 UCLA L. Rev. 711 (1982); cf. Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Colum. L. Rev. 1021 (1975) (proposing that regulation be viewed as neither an exercise of the police power, nor as a taking, but as an exercise of an "accommodation" power, which would require government to offer "fair compensation" for regulation that "goes too far").

(1922). See *San Diego*, 450 U. S., at 649 (dissenting opinion). Writing for the *Pennsylvania Coal* Court, Justice Holmes stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U. S., at 415. Those who argue that excessive regulation should be considered a violation of the Due Process Clause rather than a "taking" assert that *Pennsylvania Coal* used the word "taking" not in the literal Fifth Amendment sense, but as a metaphor for actions having the same effect as a taking by eminent domain. See, *e. g.*, *Agins* v. *City of Tiburon*, 24 Cal. 3d 266, 274, 598 P. 2d 25, 29 (1979), aff'd, 447 U. S. 255 (1980); *Fred F. French Investing Co.* v. *City of New York*, 39 N. Y. 2d 587, 594, 350 N. E. 2d 381, 385 (1976). Because no issue was presented in *Pennsylvania Coal* regarding compensation, it is argued, the Court was free to use the term loosely.[16]

The due process argument finds support, we are told, in the fact that the *Pennsylvania Coal* Court framed the question presented as "whether the police power can be stretched so far" as to destroy property rights, 260 U. S., at 413, and by the Court's emphasis upon the need to proceed by eminent domain rather than by regulation when the effect of the regulation would be to destroy property interests:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But

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[16] In *Pennsylvania Coal*, homeowners sought to enjoin a coal company from mining coal under their house in violation of Pennsylvania's Kohler Act, which prohibited the mining of coal that would cause the subsidence of any home or industrial or mercantile establishment. In defense, the coal company argued not that the regulation itself was a "taking" for which just compensation was required, but that "[i]f surface support in the anthracite district is necessary for public use, it can constitutionally be acquired only by condemnation with just compensation to the parties affected." 260 U. S., at 400.

> obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases *there must be an exercise of eminent domain and compensation to sustain the act.*" *Ibid.* (Emphasis added.)

Further, in earlier cases involving the constitutional limitations on the exercise of police power, Justice Holmes' opinions for the Court made clear that the Court did not view overly restrictive regulation as triggering an award of compensation, but as an invalid means of accomplishing what constitutionally can be accomplished only through the exercise of eminent domain. See, *e. g.*, *Block* v. *Hirsh*, 256 U. S. 135, 156 (1921); *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908); *Martin* v. *District of Columbia*, 205 U. S. 135, 139 (1907).

We need not pass upon the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession.[17] As we have noted, resolution of that

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[17] The attempt to determine when regulation goes so far that it becomes, literally or figuratively, a "taking" has been called the "lawyer's equivalent of the physicist's hunt for the quark." C. Haar, Land-Use Planning 766 (3d ed. 1976). See generally Bauman, The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls, 15 Rutgers L. J. 15, 20–32 (1983); Stoebuck, *supra*, at 1059–1079; Berger, A Policy Analysis of the Taking Problem, 49 N. Y. U. L. Rev. 165 (1974); Sax, Takings, Private Property and Public Rights, 81 Yale L. J. 149 (1971); Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44

question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its § 1983 action, because respondent failed to apply for variances from the regulations.

V

In sum, respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment.[18] We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE dissents from the holding that the issues in this case are not ripe for decision at this time.

JUSTICE POWELL took no part in the decision of this case.

S. Cal. L. Rev. 1 (1971); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

[18] In light of this disposition, we need not reach the question whether the jury's verdict that respondent's expectation interest had been "taken," see n. 12, *supra*, can stand in light of the absence of any discussion in the jury instructions about the reasonableness of the alleged expectation interest. See *Ruckelshaus* v. *Monsanto Co.*, 467 U. S., at 1005–1006; *Andrus* v. *Allard*, 444 U. S., at 66. Nor do we need to reach the question whether the jury was properly allowed to determine the economic feasibility of the property, or the extent of interference with respondent's expectation interests, by reference to only that portion of the development purchased by respondent, rather than by reference to the development as a whole. Cf. *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 130 (1978).

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

The Court today discusses two methods for analyzing the constitutional injury that may result from the temporary application of government regulations denying property any economically viable use. The Court concludes that, under either approach, the respondent's claim is premature because the petitioner Williamson County Regional Planning Commission's 1981 disapproval of the respondent's preliminary plat did not constitute a final reviewable decision given the availability of a variance procedure that the respondent did not pursue. *Ante*, at 185, 199–200.

I join the Court's opinion without, however, departing from my views set forth in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 636 (1981) (BRENNAN, J., dissenting). Because "[i]nvalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken," I believe that "once a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." *Id.*, at 653, 655. As the Court demonstrates in this case, however, "the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision." *Ante*, at 194. In addition, "[r]espondent has not shown that [Tennessee's] inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature." *Ante*, at 196–197. Accordingly, I join the Court's opinion reversing the judgment of the Court of Appeals for the Sixth Circuit.

JUSTICE STEVENS, concurring in the judgment.

Zoning restrictions are a species of governmental regulation that may impair the value of private property. The impairment may occur in one of two ways. The substance of a restriction may permanently curtail the economic value of the property. Or the procedures that must be employed, either to obtain permission to use property in a particular way or to remove an unlawful restriction on its use, may temporarily deprive the owner of a fair return on his investment. For convenience, I will refer to the former category as "permanent harms" and the latter as "temporary harms."

Permanent harms fall into three subcategories. They may be impermissible even if the government is willing to pay for them.[1] They may be permissible provided that the property owner is compensated for his loss.[2] Or they may be permissible even if no compensation at all is paid.[3] The permanent harm inflicted by the zoning regulations at issue in this case is either in the second or the third subcategory. As the Court demonstrates, until all available remedies have been exhausted, all we can say with any certainty is that petitioners may be required to abandon some of their restrictions upon respondent unless they are prepared to compensate respondent for whatever permanent harm they may cause.

In most litigation involving a challenge to a governmental regulation—and this case is no exception—the government contends that the public interest justifies the harm to the property owner and that no compensation need be paid. If the government fails to convince the court that such is the case—that is, if it is not entitled to impose an uncompensated

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[1] For example, even if the State is willing to compensate me, it has no right to appropriate my property because it does not agree with my political or religious views.

[2] See, *e. g.*, *United States* v. *50 Acres of Land*, 469 U. S. 24 (1984).

[3] See, *e. g.*, *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978).

permanent harm on the property owner—the court can express its ruling on the merits by stating that the regulation is invalid, or by characterizing it as a "taking." In either event, the essence of the holding is a conclusion that the harm caused by the regulation is one that the government may not impose unless it is prepared to pay for it. In my opinion, when such a situation develops, there is nothing in the Constitution that prevents the government from electing to abandon the permanent-harm-causing regulation. The fact that a jurist as eminent as Oliver Wendell Holmes characterized a regulation that "goes too far" as a "taking" does not mean that such a regulation may never be canceled and must always give rise to a right to compensation.[4]

To the extent that this case involves a claim that the respondent has suffered an unlawful permanent harm—whether it is called a "taking" or merely an invalid attempt to regulate—the Court correctly explains that the issue is not yet ripe for decision. We do not yet know whether the harm inflicted by the zoning regulations is severe enough to lead to the conclusion that the zoning regulations "go too far." We do know, however, that the process of determining how far the regulations do apply to respondent has already caused it a fairly serious harm—one that the jury calculated as worth $350,000. But that harm is in my second major category—it was a "temporary harm."

Temporary harms resulting from a regulatory decision fall into two broad subcategories: (1) those that result from a

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[4] In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922), Justice Holmes' opinion for the Court stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." As he explained earlier in the opinion, however, all this implies is that when regulation "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.*, at 413. For a complete discussion of this point see Siemon, Of Regulatory Takings and Other Myths, 1 J. Land Use & Env. L. 105, 110–117 (1985).

deliberate decision to appropriate certain property for public use for a limited period of time; and (2) those that are a by-product of governmental decisionmaking. The first subcategory includes, for example, the condemnation of a laundry to be used by the military for the duration of World War II, *Kimball Laundry Co.* v. *United States*, 338 U. S. 1 (1949), or the condemnation of the unexpired term of a lease, *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945)—that type of appropriation is correctly characterized as a "temporary taking." The second subcategory is fairly characterized as an inevitable cost of doing business in a highly regulated society.

Temporary harms in the second subcategory are an unfortunate but necessary by-product of disputes over the extent of the government's power to inflict permanent harms without paying for them. Every time a property owner is successful, in whole or in part, in a challenge to a governmental regulation—whether it be a zoning ordinance, a health regulation,[5] or a traffic law[6]—he is almost certain to suffer some temporary harm in the process. At the least, he will usually incur significant litigation expenses and frequently he will incur substantial revenue losses because the use of his property has been temporarily curtailed while the dispute is being resolved.

In some situations these temporary harms are compensable. Statutes authorize the recovery of some costs of litigation, including attorney's fees. Sometimes the cost of obtaining regulatory approval is budgeted in an initial development plan and ultimately recovered from consumers. But in many cases—and apparently this is one—the property owner has no effective remedy for such a temporary harm

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[5] See, *e. g.*, *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S. 607 (1980).

[6] See, *e. g.*, *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429 (1978).

except a possible claim that his constitutional rights have been violated. If his property is harmed—even temporarily—without due process of law, he may have a claim for damages based on the denial of his procedural rights.[7] But if the procedure that has been employed to determine whether a particular regulation "goes too far" is fair, I know of nothing in the Constitution that entitles him to recover for this type of temporary harm.

The Due Process Clause of the Fourteenth Amendment requires a State to employ fair procedures in the administration and enforcement of all kinds of regulations. It does not, however, impose the utopian requirement that enforcement action may not impose any cost upon the citizen unless the government's position is completely vindicated. We must presume that regulatory bodies such as zoning boards, school boards, and health boards, generally make a good-faith effort to advance the public interest when they are performing their official duties, but we must also recognize that they will often become involved in controversies that they will ultimately lose. Even though these controversies are costly and temporarily harmful to the private citizen, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable by-product of every such dispute as a "taking" of private property.

In this case there was a substantial dispute not only about the permissibility of the permanent harm, but also over the fairness of the procedures employed by petitioners. Respondent made a claim that its constitutional right to due process of law had been violated. Conceivably it might have prevailed on that theory if it could have proved that an unconstitutional procedure had resulted in an unnecessary delay in obtaining approval of its development plan. See *ante*, at 183, n. 6. But its proof failed on that issue. The jury

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[7] Cf. *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1 (1978).

found "that respondent had not been denied procedural due process." *Ante*, at 182, n. 4. In my opinion, that finding completely disposes of respondent's claim for damages based on the temporary harm resulting from the controversy between respondent and petitioners over the applicability and enforceability of the various zoning restrictions involved in this case.

There is nothing in the record to suggest that petitioners have tried to condemn any part of respondent's property, either permanently or for a limited period of time. There was no "temporary taking" of the kind involved in *Kimball Laundry Co.*, *supra*, or *General Motors Corp.*, *supra*. There has been a finding that there was no violation of procedural due process. Accordingly, the award of damages cannot stand and the judgment below must be reversed.

DOWLING *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–589. Argued April 17, 1985—Decided June 28, 1985

Title 18 U. S. C. § 2314 provides criminal penalties for any person who "transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." Petitioner was convicted in Federal District Court of violating, *inter alia*, § 2314, arising from the interstate transportation of "bootleg" phonorecords that were manufactured and distributed without the consent of the copyright owners of the musical compositions performed on the records. The Court of Appeals affirmed.

Held: Section 2314 does not reach petitioner's conduct. Pp. 213–229.

(a) The language of § 2314 does not "plainly and unmistakably" cover such conduct. The phonorecords in question were not "stolen, converted or taken by fraud" for purposes of § 2314. The section's language clearly contemplates a physical identity between the items unlawfully obtained and those eventually transported, and hence some prior physical taking of the subject goods. Since the statutorily defined property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple "goods, wares, [or] merchandise," interference with copyright does not easily equate with theft, conversion, or fraud. The infringer of a copyright does not assume physical control over the copyright nor wholly deprive its owner of its use. Infringement implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud. Pp. 214–218.

(b) The purpose of § 2314 to fill with federal action an enforcement gap created by limited state jurisdiction over interstate transportation of stolen property does not apply to petitioner's conduct. No such need for supplemental federal action has ever existed with respect to copyright infringement, since Congress has the power under the Constitution to legislate directly in this area. Pp. 218–221.

(c) The history of the criminal infringement provisions of the Copyright Act indicates that Congress had no intention to reach copyright infringement when it enacted § 2314. Pp. 221–226.

(d) To apply § 2314 to petitioner's conduct would support its extension to significant areas, such as interstate transportation of patent-

infringing goods, that Congress has evidenced no intention to enter by way of criminal sanction. Pp. 226–227.

739 F. 2d 1445, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 229.

Michael D. Abzug argued the cause for petitioner. With him on the brief was *Mary E. Kelly*.

Carolyn F. Corwin argued the cause for the United States. With her on the brief were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Gloria C. Phares*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

The National Stolen Property Act provides for the imposition of criminal penalties upon any person who "transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." 18 U. S. C. § 2314. In this case, we must determine whether the statute reaches the interstate transportation of "bootleg" phonorecords, "stolen, converted or taken by fraud" only in the sense that they were manufactured and distributed without the consent of the copyright owners of the musical compositions performed on the records.

I

After a bench trial in the United States District Court for the Central District of California conducted largely on the basis of a stipulated record, petitioner Paul Edmond Dowling was convicted of one count of conspiracy to transport stolen property in interstate commerce, in violation of 18 U. S. C.

**Ernest S. Meyers, Eugene D. Berman, Joel M. Schoenfeld*, and *Roy R. Kulcsar*, filed a brief for the Recording Industry Association of America, Inc., as *amicus curiae* urging affirmance.

§ 371; eight counts of interstate transportation of stolen property, in violation of 18 U. S. C. § 2314; nine counts of copyright infringement, in violation of 17 U. S. C. § 506(a); and three counts of mail fraud, in violation of 18 U. S. C. § 1341.[1] The offenses stemmed from an extensive bootleg record operation involving the manufacture and distribution by mail of recordings of vocal performances by Elvis Presley.[2] The

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[1] Only the § 2314 counts concern us here. Counts Two through Seven of the indictment, referring to the statute, charged:

"On or about the dates listed below and to and from the locations hereinafter specified, defendants THEAKER and DOWLING knowingly and willfully caused to be transported in interstate commerce phonorecords of a value of more than $5,000, containing Elvis Presley performances of copyrighted musical compositions, which phonorecords, as the defendants then and there well knew, were stolen, converted and taken by fraud, in that they were manufactured without the consent of the copyright proprietors." App. 6–7.

A chart then identified six shipments, each from Los Angeles County, Cal., to Baltimore, Md., the first dated January 12, 1979, and the last November 8, 1979. *Id.*, at 7. Counts Eight and Nine of the indictment referred to § 2314 and continued:

"On or about the dates listed below and to and from the locations hereinafter specified, defendants THEAKER, DOWLING and MINOR knowingly and willfully caused to be transported in interstate commerce phonorecords of a value of more than $5,000, containing Elvis Presley performances of copyrighted musical compositions, which phonorecords, as the defendants then and there well knew, were stolen, converted and taken by fraud, in that they were manufactured without the consent of the copyright proprietors." *Id.*, at 7–8.

A chart then identified two shipments, each from Los Angeles County, Cal., to Miami, Fla., the first dated November 8, 1979, and the second June 4, 1979. *Id.*, at 8.

Dowling's case was severed from that of codefendants William Samuel Theaker and Richard Minor. Theaker pleaded guilty to six counts of the indictment. Brief for United States 2, n. 1. Minor was convicted in a separate trial on all counts naming him, and the United States Court of Appeals for the Ninth Circuit affirmed in all respects. *United States* v. *Minor*, 756 F. 2d 731 (1985).

[2] A "bootleg" phonorecord is one which contains an unauthorized copy of a commercially unreleased performance. As in this case, the bootleg

evidence demonstrated that sometime around 1976, Dowling, to that time an avid collector of Presley recordings, began in conjunction with codefendant William Samuel Theaker to manufacture phonorecords of unreleased Presley recordings. They used material from a variety of sources, including studio outtakes, acetates, soundtracks from Presley motion pictures, and tapes of Presley concerts and television appearances.[3] Until early 1980, Dowling and Theaker had the records manufactured at a record-pressing company in Burbank,

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material may come from various sources. For example, fans may record concert performances, motion picture soundtracks, or television appearances. Outsiders may obtain copies of "outtakes," those portions of the tapes recorded in the studio but not included in the "master," that is, the final edited version slated for release after transcription to phonorecords or commercial tapes. Or bootleggers may gain possession of an "acetate," which is a phonorecord cut with a stylus rather than stamped, capable of being played only a few times before wearing out, and utilized to assess how a performance will likely sound on a phonorecord.

Though the terms frequently are used interchangeably, a "bootleg" record is not the same as a "pirated" one, the latter being an unauthorized copy of a performance already commercially released.

[3] See n. 2, *supra*. For example, according to the stipulated testimony of the Presley archivist at RCA Records, which held the exclusive rights to manufacture and distribute sound recordings of Presley performances from early in his career through the time of trial in this case, the "Elvis Presley Dorsey Shows" contained performances from Presley's appearances on a series of six television shows in January, February, and March 1956; "Elvis Presley From the Waist Up" contained performances from three appearances on "The Ed Sullivan Show" in September and October 1956 and January 1957; "Plantation Rock" included a version of the title song recorded from an acetate, which other testimony indicated Dowling had purchased from the author of the song; "The Legend Lives On" included material from unreleased master tapes from the RCA Records inventory; "Rockin' with Elvis New Year's Eve" derived from a recording by an audience member at a 1976 concert in Pittsburgh; and "Elvis on Tour" came from the master tape or the film source of the film of the same name. Stipulation re Testimony of Joan Deary, 2 Record, Doc. No. 109, pp. 24, 25, 35, 37, 40, 44. With the exceptions of "Plantation Rock" and "Elvis on Tour," quantities of each of these albums were included in the shipments giving rise to the § 2314 counts.

Cal. When that company later refused to take their orders, they sought out other record-pressing companies in Los Angeles and, through codefendant Richard Minor, in Miami, Fla. The bootleg entrepreneurs never obtained authorization from or paid royalties to the owners of the copyrights in the musical compositions.[4]

In the beginning, Dowling, who resided near Baltimore, handled the "artistic" end of the operation, contributing his knowledge of the Presley subculture, seeking out and selecting the musical material, designing the covers and labels, and writing the liner notes, while Theaker, who lived in Los Angeles and had some familiarity with the music industry, took care of the business end, arranging for the record pressings, distributing catalogs, and filling orders. In early 1979, however, having come to suspect that the FBI was investigating the west coast operation, Theaker began making shipments by commercial trucking companies of large quantities of the albums to Dowling in Maryland. Throughout 1979 and 1980, the venturers did their marketing through Send Service, a labeling and addressing entity, which distributed at least 50,000 copies of their catalog and advertising flyers to addresses on mailing lists provided by Theaker and Dowling. Theaker would collect customers' orders from post office

[4] See Stipulation re Copyrights, Royalties and Licenses, 2 Record, Doc. No. 109, pp. 111–125, and Stipulation re Songs on Albums, 2 Record, Doc. No. 109, pp. 127–145. The Copyright Act requires record manufacturers to obtain licenses and pay royalties to copyright holders upon pressing records that contain performances of copyrighted musical compositions. 17 U. S. C. § 115.

While motion-picture copyrights protect the soundtracks of Presley's movies, Congress did not extend federal copyright protection to sound recordings until the Sound Recording Act of 1971, Pub. L. 92–140, 85 Stat. 391, and then only to sound recordings fixed after February 15, 1972. See *Goldstein* v. *California*, 412 U. S. 546, 551–552 (1973). Therefore, most of the sound recordings involved in this case, as opposed to the musical compositions performed, are apparently not protected by copyright. In any event, the § 2314 counts rely solely on infringement of copyrights to musical compositions. See n. 1, *supra*.

boxes in Glendale, Cal., and mail them to Dowling in Maryland, who would fill the orders. The two did a substantial business: the stipulated testimony establishes that throughout this period Dowling mailed several hundred packages per week and regularly spent $1,000 per week in postage. The men also had occasion to make large shipments from Los Angeles to Minor in Miami, who purchased quantities of their albums for resale through his own channels.

The eight § 2314 counts on which Dowling was convicted arose out of six shipments of bootleg phonorecords from Los Angeles to Baltimore and two shipments from Los Angeles to Miami. See n. 1, *supra*. The evidence established that each shipment included thousands of albums, that each album contained performances of copyrighted musical compositions for the use of which no licenses had been obtained nor royalties paid, and that the value of each shipment attributable to copyrighted material exceeded the statutory minimum.

Dowling appealed from all the convictions save those for copyright infringement, and the United States Court of Appeals for the Ninth Circuit affirmed in all respects. 739 F. 2d 1445 (1984). As to the charges under § 2314, the court relied on its decision in *United States* v. *Belmont*, 715 F. 2d 459 (1983), cert. denied, 465 U. S. 1022 (1984), where it had held that interstate transportation of videotape cassettes containing unauthorized copies of copyrighted motion pictures involved stolen goods within the meaning of the statute.[5] As in *Belmont*, the court reasoned that the rights of copyright owners in their protected property were indistinguishable from ownership interests in other types of property and were equally deserving of protection under the statute. 739 F. 2d, at 1450, quoting 715 F. 2d, at 461–462.

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[5] See also *United States* v. *Atherton*, 561 F. 2d 747, 752 (CA9 1977) (motion pictures); *United States* v. *Drebin*, 557 F. 2d 1316, 1328 (CA9 1977) (motion pictures), cert. denied, 436 U. S. 904 (1978); *United States* v. *Minor*, 756 F. 2d 731 (CA9 1985) (sound recordings).

We granted certiorari to resolve an apparent conflict among the Circuits[6] concerning the application of the statute to interstate shipments of bootleg and pirated sound recordings and motion pictures whose unauthorized distribution infringed valid copyrights. 469 U. S. 1157 (1985).

II

Federal crimes, of course, "are solely creatures of statute." *Liparota* v. *United States*, 471 U. S. 419, 424 (1985), citing *United States* v. *Hudson*, 7 Cranch 32 (1812). Accordingly, when assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a "narrow interpretation" appropriate. See *Williams* v. *United States*, 458 U. S. 279, 290 (1982). Chief Justice Marshall early observed:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of

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[6] In *United States* v. *Smith*, 686 F. 2d 234 (CA5 1982), the court held that interstate transportation of unauthorized copies of copyrighted motion pictures recorded "off the air" during television broadcasting did not fall within the reach of § 2314. The other courts which have addressed the issue have either agreed with the Ninth Circuit that interstate transportation of copies of infringing motion pictures and sound recordings comes within the statute, or assumed the same. See *United States* v. *Drum*, 733 F. 2d 1503, 1505–1506 (CA11) (sound recordings), cert. denied, 469 U. S. 1061 (1984); *United States* v. *Gottesman*, 724 F. 2d 1517, 1519–1521 (CA11 1984) (motion pictures); *United States* v. *Whetzel*, 191 U. S. App. D. C. 184, 187, n. 10, 589 F. 2d 707, 710, n. 10 (1978) (sound recordings); *United States* v. *Berkwitt*, 619 F. 2d 649, 656–658 (CA7 1980) (sound recordings); *United States* v. *Gallant*, 570 F. Supp. 303, 310–314 (SDNY 1983) (sound recordings); *United States* v. *Sam Goody, Inc.*, 506 F. Supp. 380, 385–391 (EDNY 1981) (sound recordings). See also *United States* v. *Steerwell Leisure Corp.*, 598 F. Supp. 171, 174 (WDNY 1984) (video games).

> individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820).

Thus, the Court has stressed repeatedly that "'"when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."'" *Williams* v. *United States*, 458 U. S., at 290, quoting *United States* v. *Bass*, 404 U. S. 336, 347 (1971), which in turn quotes *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222 (1952).

A

Applying that prudent rule of construction here, we examine at the outset the statutory language. Section 2314 requires, first, that the defendant have transported "goods, wares, [or] merchandise" in interstate or foreign commerce; second, that those goods have a value of "$5,000 or more"; and, third, that the defendant "kno[w] the same to have been stolen, converted or taken by fraud." Dowling does not contest that he caused the shipment of goods in interstate commerce, or that the shipments had sufficient value to meet the monetary requirement. He argues, instead, that the goods shipped were not "stolen, converted or taken by fraud." In response, the Government does not suggest that Dowling wrongfully came by the phonorecords actually shipped or the physical materials from which they were made; nor does it contend that the objects that Dowling caused to be shipped, the bootleg phonorecords, were "the same" as the copyrights in the musical compositions that he infringed by unauthorized distribution of Presley performances of those compositions. The Government argues, however, that the shipments come within the reach of § 2314 because the phonorecords physi-

cally embodied performances of musical compositions that Dowling had no legal right to distribute. According to the Government, the unauthorized use of the musical compositions rendered the phonorecords "stolen, converted or taken by fraud" within the meaning of the statute.[7] We

[7] The Government argues in the alternative that even if the unauthorized use of copyrighted musical compositions does not alone render the phonorecords contained in these shipments "stolen, converted or taken by fraud," the record contains evidence amply establishing that the bootleggers obtained the source material through illicit means. The Government points to testimony, for example, that the custodians of the tapes containing the outtakes which found their way onto Dowling's records neither authorized their release nor permitted access to them by unauthorized persons. App. 22–23, 34, 38–39, 42–43, 46. According to the Government, the wrongfully obtained tapes which contained the musical material should be considered "the same" as the phonorecords onto which the sounds were transferred, which were therefore "stolen, converted or taken by fraud" within the meaning of § 2314. Cf. *United States* v. *Bottone*, 365 F. 2d 389 (CA2), cert. denied, 385 U. S. 974 (1966).

For several reasons, we decline to consider this alternative basis for upholding Dowling's convictions. The § 2314 counts in the indictment were founded exclusively on the allegations that the shipped phonorecords, which contained "Elvis Presley performances of copyrighted musical compositions," were "stolen, converted and taken by fraud, in that they were manufactured without the consent of the copyright proprietors." See n. 1, *supra*. The decision of the Court of Appeals does not rely on any theory of illegal procurement; it rests solely on a holding that "Dowling's unauthorized sale of phonorecords of copyrighted material clearly involved 'goods, wares or merchandise' within the meaning of the statute." 739 F. 2d 1445, 1450–1451 (CA9 1984). Moreover, even assuming that the stipulated testimony contained sufficient evidence to establish the unlawful procurement of the source material, the Government made no attempt in the District Court to address the difficult problems of valuation under its alternative theory. For example, it introduced no evidence that might have established the value of the tapes allegedly stolen from the RCA archives, nor how that value might relate to the value of the goods ultimately shipped. Instead, its evidence concerning the value of the interstate shipments of records attempted to isolate the value attributable to the copyrighted musical compositions. App. 24–33. Under these circumstances, we assess the validity of Dowling's convictions only under the allegations made in the indictment.

must determine, therefore, whether phonorecords that include the performance of copyrighted musical compositions for the use of which no authorization has been sought nor royalties paid are consequently "stolen, converted or taken by fraud" for purposes of § 2314. We conclude that they are not.

The courts interpreting § 2314 have never required, of course, that the items stolen and transported remain in entirely unaltered form. See, *e. g.*, *United States* v. *Moore*, 571 F. 2d 154, 158 (CA3) (counterfeit printed Ticketron tickets "the same" as stolen blanks from which they were printed), cert. denied, 435 U. S. 956 (1978). Nor does it matter that the item owes a major portion of its value to an intangible component. See, *e. g.*, *United States* v. *Seagraves*, 265 F. 2d 876 (CA3 1959) (geophysical maps identifying possible oil deposits); *United States* v. *Greenwald*, 479 F. 2d 320 (CA6) (documents bearing secret chemical formulae), cert. denied, 414 U. S. 854 (1973). But these cases and others prosecuted under § 2314 have always involved physical "goods, wares, [or] merchandise" that have themselves been "stolen, converted or taken by fraud." This basic element comports with the common-sense meaning of the statutory language: by requiring that the "goods, wares, [or] merchandise" be "the same" as those "stolen, converted or taken by fraud," the provision seems clearly to contemplate a physical identity between the items unlawfully obtained and those eventually transported, and hence some prior physical taking of the subject goods.

In contrast, the Government's theory here would make theft, conversion, or fraud equivalent to wrongful appropriation of statutorily protected rights in copyright. The copyright owner, however, holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections. "Section 106 of the Copyright Act confers a bundle of exclusive rights

to the owner of the copyright," which include the rights "to publish, copy, and distribute the author's work." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 546–547 (1985). See 17 U. S. C. § 106. However, "[t]his protection has never accorded the copyright owner complete control over all possible uses of his work." *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U. S. 417, 432 (1984); *id.*, at 462–463 (dissenting opinion). For example, § 107 of the Copyright Act "codifies the traditional privilege of other authors to make 'fair use' of an earlier writer's work." *Harper & Row*, *supra*, at 547. Likewise, § 115 grants compulsory licenses in nondramatic musical works. Thus, the property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple "goods, wares, [or] merchandise," for the copyright holder's dominion is subjected to precisely defined limits.

It follows that interference with copyright does not easily equate with theft, conversion, or fraud. The Copyright Act even employs a separate term of art to define one who misappropriates a copyright: "'Anyone who violates any of the exclusive rights of the copyright owner,' that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, 'is an infringer of the copyright.' [17 U. S. C.] § 501(a)." *Sony Corp.*, *supra*, at 433. There is no dispute in this case that Dowling's unauthorized inclusion on his bootleg albums of performances of copyrighted compositions constituted infringement of those copyrights. It is less clear, however, that the taking that occurs when an infringer arrogates the use of another's protected work comfortably fits the terms associated with physical removal employed by § 2314. The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially link infringement with some general notion of wrong-

ful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud. As a result, it fits but awkwardly with the language Congress chose—"stolen, converted or taken by fraud"—to describe the sorts of goods whose interstate shipment § 2314 makes criminal.[8] "And, when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings.'" *Williams* v. *United States*, 458 U. S., at 286.

B

In light of the ill-fitting language, we turn to consider whether the history and purpose of § 2314 evince a plain congressional intention to reach interstate shipments of goods infringing copyrights. Our examination of the background of the provision makes more acute our reluctance to read § 2314 to encompass merchandise whose contraband character derives from copyright infringement.

Congress enacted § 2314 as an extension of the National Motor Vehicle Theft Act, ch. 89, 41 Stat. 324, currently codified at 18 U. S. C. § 2312. Passed in 1919, the earlier

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[8] The dissent relies on *United States* v. *Turley*, 352 U. S. 407 (1957), and *Morissette* v. *United States*, 342 U. S. 246 (1952), to give § 2314 a "very broad" reading. *Post*, at 231–232. In *Turley*, after considering the purpose of the National Motor Vehicle Theft Act to combat interstate transportation of feloniously taken vehicles, the Court rejected an interpretation of "stolen" which would have limited that term to common-law larceny. 352 U. S., at 417. Similarly, in *Morissette*, in considering the language of 18 U. S. C. § 641 providing that "[w]hoever embezzles, steals, purloins, or knowingly converts" Government property be subject to specified penalties, the Court pointed out that conversion extends beyond the common-law definition of stealing. 342 U. S., at 271–272. Neither *Turley* nor *Morissette* involved copyright law specifically or intellectual property in general; neither, therefore, sheds light on the particular problems presented by this case. See Parts II–B through II–D, *infra*.

Act was an attempt to supplement the efforts of the States to combat automobile thefts. Particularly in areas close to state lines,[9] state law enforcement authorities were seriously hampered by car thieves' ability to transport stolen vehicles beyond the jurisdiction in which the theft occurred.[10] Legislating pursuant to its commerce power,[11] Congress made unlawful the interstate transportation of stolen vehicles, thereby filling in the enforcement gap by "strik[ing] down State lines which serve as barriers to protect [these interstate criminals] from justice." 58 Cong. Rec. 5476 (1919) (statement of Rep. Newton).[12]

Congress acted to fill an identical enforcement gap when in 1934 it "extend[ed] the provisions of the National Motor Vehicle Theft Act to other stolen property" by means of the National Stolen Property Act. Act of May 22, 1934, 48

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[9] See 58 Cong. Rec. 5472 (1919) (statement of Rep. Reavis); *id.*, at 5474 (statement of Rep. Bee).

[10] See *id.*, at 5471 (statement of Rep. Dyer) ("State laws upon the subject have been inadequate to meet the evil. Thieves steal automobiles and take them from one State to another and ofttimes have associates in this crime who receive and sell the stolen machines").

[11] See, *e. g.*, *id.*, at 5471–5472 (statement of Rep. Dyer); *id.*, at 5475–5476 (statement of Rep. Newton).

[12] This Court has explained:

"By 1919, the law of most States against local theft had developed so as to include not only common-law larceny but embezzlement, false pretenses, larceny by trick, and other types of wrongful taking. The advent of the automobile, however, created a new problem with which the States found it difficult to deal. The automobile was uniquely suited to felonious taking whether by larceny, embezzlement or false pretenses. It was a valuable, salable article which itself supplied the means for speedy escape. 'The automobile [became] the perfect chattel for modern large-scale theft.' This challenge could be best met through use of the Federal Government's jurisdiction over interstate commerce. The need for federal action increased with the number, distribution and speed of the motor vehicles until, by 1919, it became a necessity. The result was the National Motor Vehicle Theft Act." *United States* v. *Turley*, 352 U. S., at 413–414 (footnote omitted).

Stat. 794. See S. Rep. No. 538, 73d Cong., 2d Sess., 1 (1934); H. R. Rep. No. 1462, 73d Cong., 2d Sess., 1 (1934); H. R. Conf. Rep. No. 1599, 73d Cong., 2d Sess., 1, 3 (1934). Again, Congress acted under its commerce power to assist the States' efforts to foil the "roving criminal," whose movement across state lines stymied local law enforcement officials. 78 Cong. Rec. 2947 (1934) (statement of Attorney General Cummings).[13] As with its progenitor, Congress responded in the National Stolen Property Act to "the need for federal action" in an area that normally would have been left to state law. *United States* v. *Turley*, 352 U. S. 407, 417 (1957).

No such need for supplemental federal action has ever existed, however, with respect to copyright infringement, for the obvious reason that Congress always has had the bestowed authority to legislate directly in this area. Article I, § 8, cl. 8, of the Constitution provides that Congress shall have the power

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

By virtue of the explicit constitutional grant, Congress has the unquestioned authority to penalize directly the distribution of goods that infringe copyright, whether or not those goods affect interstate commerce. Given that power, it is

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[13] The Attorney General explained: "These criminals have made full use of the improved methods of transportation and communication, and have taken advantage of the limited jurisdiction possessed by State authorities in pursuing fugitive criminals, and of the want of any central coordinating agency acting on behalf of all of the States. In pursuing this class of offenders, almost inevitably breakdown of law enforcement results from this want of some coordinating and centralized law enforcement agency. . . . [T]he territorial limitations on [local law enforcement authorities'] jurisdiction prevent them from adequately protecting their citizens from this type of criminal." 78 Cong. Rec. 2947 (1934).

implausible to suppose that Congress intended to combat the problem of copyright infringement by the circuitous route hypothesized by the Government. See *United States* v. *Smith*, 686 F. 2d 234, 246 (CA5 1982). Of course, the enactment of criminal penalties for copyright infringement would not prevent Congress from choosing as well to criminalize the interstate shipment of infringing goods. But in dealing with the distribution of such goods, Congress has never thought it necessary to distinguish between intrastate and interstate activity. Nor does any good reason to do so occur to us. In sum, the premise of § 2314—the need to fill with federal action an enforcement chasm created by limited state jurisdiction—simply does not apply to the conduct the Government seeks to reach here.

C

The history of copyright infringement provisions affords additional reason to hesitate before extending § 2314 to cover the interstate shipments in this case. Not only has Congress chiefly relied on an array of civil remedies to provide copyright holders protection against infringement, see 17 U. S. C. §§ 502–505, but in exercising its power to render criminal certain forms of copyright infringement, it has acted with exceeding caution.

The first full-fledged criminal provisions appeared in the Copyright Act of 1909, and specified that misdemeanor penalties of up to one year in jail or a fine between $100 and $1,000, or both, be imposed upon "any person who willfully and for profit" infringed a protected copyright.[14] This provision

[14] Act of Mar. 4, 1909, § 28, 35 Stat. 1082. Interestingly, however, the 1909 Act did not extend criminal liability to infringement by unauthorized mechanical reproduction of copyrighted musical compositions subject to compulsory licensing, the category of infringement underlying the § 2314 counts here. See § 25(e), 35 Stat. 1081. Congress did not remove this bar until the Sound Recording Act of 1971, Pub. L. 92–140, 85 Stat. 391, which, while for the first time extending federal copyright coverage to sound recordings, see n. 4, *supra*, also made willful infringement of copyright in

was little used. In 1974, however, Congress amended the section, by then 17 U. S. C. § 104 (1976 ed.) by the 1947 revision,[15] substantially to increase penalties for record piracy.[16] The new version retained the existing language, but supplemented it with a new subsection (b), which provided that one who "willfully and for profit" infringed a copyright in sound recordings would be subject to a fine of up to $25,000 or imprisonment for up to one year, or both. 17 U. S. C. § 104(b) (1976 ed.).[17] The legislative history demonstrates that in increasing the penalties available for this category of infringement, Congress carefully calibrated the penalty to the problem: it had come to recognize that "record piracy is so profitable that ordinary penalties fail to deter prospective offenders." H. R. Rep. No. 93–1581, p. 4 (1974). Even so, because it considered record piracy primarily an economic offense, Congress, after serious consideration, rejected a proposal to increase the available term of imprisonment to three years for a first offense and seven years for a subsequent offense. *Ibid.*

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musical compositions subject to the general criminal provision. See 85 Stat. 392.

Congress first provided criminal penalties for copyright infringement in the Act of Jan. 6, 1897, 29 Stat. 481, which made a misdemeanor, punishable by imprisonment for one year, of the unlawful performance or presentation, done willfully and for profit, of a copyrighted dramatic or musical composition. See also Act of May 31, 1790, § 2, 1 Stat. 124 (fixed civil penalties, one-half payable to the United States, for unauthorized copying of copyrighted book, chart, or map). See generally Young, Criminal Copyright Infringement and a Step Beyond, reprinted in 30 ASCAP Copyright Law Symposium 157 (1983); Gawthrop, An Inquiry Into Criminal Copyright Infringement, reprinted in 20 ASCAP Copyright Law Symposium 154 (1972).

[15] Act of July 30, 1947, ch. 391, 61 Stat. 652.

[16] Act of Dec. 31, 1974, Pub. L. 93–573, 88 Stat. 1873.

[17] A second violation subjected the offender to a fine of up to $50,000 or imprisonment for not more than two years, or both. 17 U. S. C. § 104(b) (1976 ed.). See H. R. Rep. No. 93–1581, p. 4 (1974).

When in 1976, after more than 20 years of study, Congress adopted a comprehensive revision of the Copyright Act, see *Mills Music, Inc.* v. *Snyder*, 469 U. S. 153, 159–161 (1985); *Sony Corp.*, 464 U. S., at 462–463, n. 9 (dissenting opinion), it again altered the scope of the criminal infringement actions, albeit cautiously. Section 101 of the new Act provided:

> "Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be fined not more than $10,000 or imprisoned for not more than one year, or both: *Provided, however*, That any person who infringes willfully and for purposes of commercial advantage or private financial gain the copyright in a sound recording afforded by subsections (1), (2), or (3) of section 106 or the copyright in a motion picture afforded by subsections (1), (3), or (4) of section 106 shall be fined not more than $25,000 or imprisoned for not more than one year, or both, for the first such offense and shall be fined not more than $50,000 or imprisoned for not more than two years, or both, for any subsequent offense." 17 U. S. C. § 506(a) (1976 ed., Supp. V).

Two features of this provision are noteworthy: first, Congress extended to motion pictures the enhanced penalties applicable by virtue of prior § 104 to infringement of rights in sound recordings; and, second, Congress recited the infringing uses giving rise to liability. It is also noteworthy that despite the urging of representatives of the film industry, see Copyright Law Revision: Hearings on H. R. 2223 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., 716 (1975) (statement of Jack Valenti, president of the Motion Picture Association of America, Inc.), and the initial inclination of the Senate,

see S. Rep. No. 94–473, p. 146 (1975), Congress declined once again to provide felony penalties for copyright infringement involving sound recordings and motion pictures.

Finally, by the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. 97–180, 96 Stat. 91, Congress chose to address the problem of bootlegging and piracy of records, tapes, and films by imposing felony penalties on such activities. Section 5 of the 1982 Act revised 17 U. S. C. § 506(a) to provide that "[a]ny person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18." Section 2319(b)(1), in turn, was then enacted to provide for a fine of up to $250,000, or imprisonment of up to five years, or both, if the offense "involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of at least one thousand phonorecords or copies infringing the copyright in one or more sound recordings [or] at least sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works." Subsection (b)(2) provides for a similar fine and up to two years' imprisonment if the offense involves "more than one hundred but less than one thousand phonorecords or copies infringing the copyright in one or more sound recordings [or] more than seven but less than sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works." And subsection (b)(3) provides for a fine of not more than $25,000 and up to one year's imprisonment in any other case of willful infringement. The legislative history indicates that Congress set out from a belief that the existing misdemeanor penalties for copyright infringement were simply inadequate to deter the enormously lucrative activities of large-scale bootleggers and pirates. See 128 Cong. Rec. 9158–9159 (1982) (remarks of Rep. Kastenmeier); The Piracy and Counterfeiting Amendments Act of 1981: Hearings on S. 691 before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 8 (1981) (statement of Renee

L. Szybala, Special Assistant to the Associate Attorney General). Accordingly, it acted to "strengthen the laws against record, tape, and film piracy" by "increas[ing] the penalties . . . for copyright infringements involving such products," thereby "bring[ing] the penalties for record and film piracy . . . into line with the enormous profits which are being reaped from such activities." S. Rep. No. 97–274, pp. 1, 7 (1981).[18]

Thus, the history of the criminal infringement provisions of the Copyright Act reveals a good deal of care on Congress' part before subjecting copyright infringement to serious criminal penalties. First, Congress hesitated long before imposing felony sanctions on copyright infringers. Second, when it did so, it carefully chose those areas of infringement that required severe response—specifically, sound recordings and motion pictures—and studiously graded penalties even in those areas of heightened concern. This step-by-step, carefully considered approach is consistent with Congress' traditional sensitivity to the special concerns implicated by the copyright laws.

In stark contrast, the Government's theory of this case presupposes a congressional decision to bring the felony provisions of § 2314, which make available the comparatively light fine of not more than $10,000 but the relatively harsh

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[18] The Act also substantially increased penalties for trafficking in counterfeit labels affixed to sound recordings, motion pictures, and other audiovisual works. 18 U. S. C. § 2318.

The dissent suggests that by providing that the new penalties "shall be in addition to any other provisions of Title 17 or any other law," 18 U. S. C. § 2319(a), Congress "implicitly" approved the interpretation of § 2314 urged by the Government. *Post*, at 233. Neither the text nor the legislative history of either the 1982 Act or earlier copyright legislation evidences any congressional awareness, let alone approval, of the use of § 2314 in prosecutions like the one now before us. In the absence of any such indication, we decline to read the general language appended to § 2319(a) impliedly to validate extension of § 2314 in a manner otherwise unsupported by its language and purpose.

term of imprisonment of up to 10 years, to bear on the distribution of a sufficient quantity of *any* infringing goods simply because of the presence here of a factor—interstate transportation—not otherwise thought relevant to copyright law. The Government thereby presumes congressional adoption of an indirect but blunderbuss solution to a problem treated with precision when considered directly. To the contrary, the discrepancy between the two approaches convinces us that Congress had no intention to reach copyright infringement when it enacted § 2314.

D

The broad consequences of the Government's theory, both in the field of copyright and in kindred fields of intellectual property law, provide a final and dispositive factor against reading § 2314 in the manner suggested. For example, in *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539 (1985), this Court very recently held that The Nation, a weekly magazine of political commentary, had infringed former President Ford's copyright in the unpublished manuscript of his memoirs by verbatim excerpting of some 300 words from the work. It rejected The Nation's argument that the excerpting constituted fair use. Presented with the facts of that case as a hypothetical at oral argument in the present litigation, the Government conceded that its theory of § 2314 would permit prosecution of the magazine if it transported copies of sufficient value across state lines. Tr. of Oral Arg. 35. Whatever the wisdom or propriety of The Nation's decision to publish the excerpts, we would pause, in the absence of any explicit indication of congressional intention, to bring such conduct within the purview of a criminal statute making available serious penalties for the interstate transportation of goods "stolen, converted or taken by fraud."

Likewise, the field of copyright does not cabin the Government's theory, which would as easily encompass the law of patents and other forms of intellectual property. If "the

intangible idea protected by the copyright is effectively made tangible by its embodiment upon the tapes," *United States* v. *Gottesman*, 724 F. 2d 1517, 1520 (CA11 1984), phonorecords, or films shipped in interstate commerce as to render those items stolen goods for purposes of § 2314, so too would the intangible idea protected by a patent be made tangible by its embodiment in an article manufactured in accord with patented specifications. Thus, as the Government as much as acknowledged at argument, Tr. of Oral Arg. 29, its view of the statute would readily permit its application to interstate shipments of patent-infringing goods. Despite its undoubted power to do so, however, Congress has not provided criminal penalties for distribution of goods infringing valid patents.[19] Thus, the rationale supporting application of the statute under the circumstances of this case would equally justify its use in wide expanses of the law which Congress has evidenced no intention to enter by way of criminal sanction.[20] This factor militates strongly against the reading proffered by the Government. Cf. *Williams* v. *United States*, 458 U. S., at 287.

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[19] Congress instead has relied on provisions affording patent owners a civil cause of action. 35 U. S. C. §§ 281–294. Among the available remedies are treble damages for willful infringement. § 284; see, *e. g.*, *American Safety Table Co.* v. *Schreiber*, 415 F. 2d 373, 378–379 (CA2 1969), cert. denied, 396 U. S. 1038 (1970). See generally 2 P. Rosenberg, Patent Law Fundamentals § 17.08 (2d ed. 1985). The only criminal provision relating to patents is 18 U. S. C. § 497, which proscribes the forgery, counterfeiting, or false alteration of letters patent, or the uttering thereof. See also 35 U. S. C. § 292 ($500 penalty, one-half to go to person suing and one-half to the United States, for false marking of patent status).

[20] The Government's rationale would also apply to goods infringing trademark rights. Yet, despite having long and extensively legislated in this area, see federal Trademark Act of 1946 (Lanham Act), 15 U. S. C. § 1051 *et seq.*, in the modern era Congress only recently has resorted to criminal sanctions to control trademark infringement. See Trademark Counterfeiting Act of 1984, Pub. L. 98–473, ch. XV, 98 Stat. 2178. See also S. Rep. No. 98–526, pp. 1–2, 5 (1984); 2 J. McCarthy, Trademarks and Unfair Competition § 30:39 (2d ed. 1984).

III

No more than other legislation do criminal statutes take on straitjackets upon enactment. In sanctioning the use of § 2314 in the manner urged by the Government here, the Courts of Appeals understandably have sought to utilize an existing and readily available tool to combat the increasingly serious problem of bootlegging, piracy, and copyright infringement. Nevertheless, the deliberation with which Congress over the last decade has addressed the problem of copyright infringement for profit, as well as the precision with which it has chosen to apply criminal penalties in this area, demonstrates anew the wisdom of leaving it to the legislature to define crime and prescribe penalties.[21] Here, the language of § 2314 does not "plainly and unmistakably" cover petitioner Dowling's conduct, *United States* v. *Lacher*, 134 U. S. 624, 628 (1890); the purpose of the provision to fill gaps in state law enforcement does not couch the problem under attack; and the rationale employed to apply the statute to

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[21] Indeed, in opposing the petition for a writ of certiorari in this case, the Government acknowledged that it no longer needs § 2314 to prosecute and punish serious copyright infringement. Adverting to the most recent congressional copyright action, it advised the Court:

"[A]pplication of Section 2314 . . . to the sort of conduct involved in this case is of considerably diminished significance since passage, subsequent to the offenses involved in this case, of the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97–180, 96 Stat. 91 *et seq.* (codified at 17 U. S. C. 506(a) and 18 U. S. C. 2318, 2319). The new statute provides for felony treatment for most serious cases of copyright infringement involving sound recordings and audiovisual materials and trafficking in counterfeit labels, while prior law provided only for misdemeanor treatment for first offenses under the copyright statutes. In view of the increased penalties provided under the new statute, prosecutors are likely to have less occasion to invoke other criminal statutes in connection with copyright infringing activity." Brief in Opposition 8.

These observations suggest the conclusion we have reached—that § 2314 was not in the first place the proper means by which to counter the spread of copyright infringement in sound recordings and motion pictures.

petitioner's conduct would support its extension to significant bodies of law that Congress gave no indication it intended to touch. In sum, Congress has not spoken with the requisite clarity. Invoking the "time-honored interpretive guideline" that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,'" *Liparota* v. *United States*, 471 U. S., at 427, quoting *Rewis* v. *United States*, 401 U. S. 808, 812 (1971), we reverse the judgment of the Court of Appeals.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

The Court holds today that 18 U. S. C § 2314 does not apply to this case because the rights of a copyright holder are "different" from the rights of owners of other kinds of property. The Court does not explain, however, how the differences it identifies are relevant either under the language of § 2314 or in terms of the purposes of the statute. Because I believe that the language of § 2314 fairly covers the interstate transportation of goods containing unauthorized use of copyrighted material, I dissent.

Section 2314 provides for criminal penalties against any person who "transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." There is no dispute that the items Dowling transported in interstate commerce—bootleg Elvis Presley records—are goods, wares, or merchandise. Nor is there a dispute that the records contained copyrighted Elvis Presley performances that Dowling had no right to reproduce and distribute. The only issue here is whether the unauthorized use of a copyright may be "equate[d] with theft, conversion, or fraud" for purposes of § 2314. *Ante*, at 217. Virtually every court that has considered the question has concluded that § 2314 is broad

enough to cover activities such as Dowling's. See, *e. g.*, *United States* v. *Drum*, 733 F. 2d 1503, 1505–1506 (CA11), cert. denied, 469 U. S. 1061 (1984); *United States* v. *Whetzel*, 191 U. S. App. D. C. 184, 187, n. 10, 589 F. 2d 707, 710, n. 10 (1978); *United States* v. *Berkwitt*, 619 F. 2d 649, 656–658 (CA7 1980); *United States* v. *Sam Goody, Inc.*, 506 F. Supp. 380, 385–391 (EDNY 1981). The only case cited by the Court that lends support to its holding is *United States* v. *Smith*, 686 F. 2d 234 (CA5 1982).[1] The Court's decision today is thus contrary to the clear weight of authority.

The Court focuses on the fact that "[t]he copyright owner . . . holds no ordinary chattel." *Ante*, at 216. The Court quite correctly notes that a copyright is "comprise[d] . . . of carefully defined and carefully delimited interests," *ibid.*, and that the copyright owner does not enjoy "'complete control over all possible uses of his work,'" *ante*, at 217, quoting *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U. S. 417, 432 (1984). But among the rights a copyright owner enjoys is the right to publish, copy, and distribute the copyrighted work. Indeed, these rights define virtually the entire scope of an owner's rights in intangible property such as a copyright. Interference with these rights may be "different" from the physical removal of tangible objects, but it is not clear why this difference matters under the terms of § 2314. The statute makes no distinction between tangible and intangible property. The basic goal of the National Stolen Property Act, thwarting the interstate transportation of misappropriated goods, is not served by the judicial imposition of this distinction. Although the rights of copyright owners

[1] In *United States* v. *Drum*, the Court of Appeals for the Eleventh Circuit considered and rejected the arguments offered in *United States* v. *Smith* and reiterated by the Court today. I agree with *Drum* that neither the language nor purpose of § 2314 supports the view that the statute does not reach the unauthorized duplication and distribution of copyrighted material.

in their property may be more limited than those of owners of other kinds of property, they are surely "just as deserving of protection . . . ." *United States* v. *Drum*, *supra*, at 1506.

The Court concedes that § 2314 has never been interpreted to require that the goods, wares, or merchandise stolen and transported in violation of the statute remain in unaltered form. *Ante*, at 216. See also *United States* v. *Bottone*, 365 F. 2d 389, 393–394 (CA2 1966). It likewise recognizes that the statute is applicable even when the misappropriated item "owes a major portion of its value to an intangible component." *Ante*, at 216. The difficulty the Court finds with the application of § 2314 here is in finding a theft, conversion, or fraudulent taking, in light of the intangible nature of a copyright. But this difficulty, it seems to me, has more to do with its views on the relative evil of copyright infringement versus other kinds of thievery, than it does with interpretation of the statutory language.

The statutory terms at issue here, *i. e.*, "stolen, converted or taken by fraud," traditionally have been given broad scope by the courts. For example, in *United States* v. *Turley*, 352 U. S. 407 (1957), this Court held that the term "stolen" included all felonious takings with intent to deprive the owner of the rights and benefits of ownership, regardless of whether the theft would constitute larceny at common law. *Id.*, at 417. Similarly, in *Morissette* v. *United States*, 342 U. S. 246 (1952), the Court stated that conversion "may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use." *Id.*, at 271–272.

Dowling's unauthorized duplication and commercial exploitation of the copyrighted performances were intended to gain for himself the rights and benefits lawfully reserved to the copyright owner. Under *Turley*, *supra*, his acts should be

viewed as the theft of these performances. Likewise, Dowling's acts constitute the unauthorized use of another's property and are fairly cognizable as conversion under the Court's definition in *Morissette*.

The Court invokes the familiar rule that a criminal statute is to be construed narrowly. This rule is intended to assure fair warning to the public, *e. g.*, *United States* v. *Bass*, 404 U. S. 336, 348 (1971); *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931), and is applied when statutory language is ambiguous or inadequate to put persons on notice of what the legislature has made a crime. See, *e. g.*, *United States* v. *Bass*, *supra*; *Rewis* v. *United States*, 401 U. S. 808, 812 (1971); *Bell* v. *United States*, 349 U. S. 81, 83 (1955). I disagree not with these principles, but with their application to this statute. As I read § 2314, it is not ambiguous, but simply very broad. The statute punishes individuals who transport goods, wares, or merchandise worth $5,000 or more, knowing "the same to have been stolen, converted or taken by fraud." 18 U. S. C. § 2314. As noted above, this Court has given the terms "stolen" and "converted" broad meaning in the past. The petitioner could not have had any doubt that he was committing a theft as well as defrauding the copyright owner.[2]

The Court also emphasizes the fact that the copyright laws contain their own penalties for violation of their terms. But the fact that particular conduct may violate more than one federal law does not foreclose the Government from making a choice as to which of the statutes should be the basis for an indictment. "This Court has long recognized that when an act violates more than one criminal statute, the Govern-

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[2] Indeed, there was stipulated testimony by a former employee of petitioner's, himself an unindicted co-conspirator, that petitioner and his partner "were wary of any unusually large record orders, because they could be charged with an interstate transportation of stolen property if they shipped more than $5,000 worth of records." App. A19–A20 (stipulation regarding testimony of Aca "Ace" Anderson).

ment may prosecute under either so long as it does not discriminate against any class of defendants." *United States* v. *Batchelder*, 442 U. S. 114, 123–124 (1979).

Finally, Congress implicitly has approved the Government's use of § 2314 to reach conduct like Dowling's. In adopting the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. 97–180, 96 Stat. 91, Congress provided that the new penalties "shall be in addition to any other provisions of title 17 *or any other law.*" 18 U. S. C. § 2319(a) (emphasis added). The Senate Judiciary Committee specifically added the italicized language to clarify that the new provision "supplement[s] existing remedies contained in the copyright law *or any other law.*" S. Rep. No. 97–274, p. 2 (1981) (emphasis added). Many courts had used § 2314 to reach the shipment of goods containing unauthorized use of copyrighted material prior to the enactment of the Piracy and Counterfeiting Amendments Act. By choosing to make its new felony provisions supplemental, Congress implicitly consented to continued application of § 2314 to these offenses.

Dowling and his partners "could not have doubted the criminal nature of their conduct . . . ." *United States* v. *Bottone*, *supra*, at 394. His claim that § 2314 does not reach his clearly unlawful use of copyrighted performances evinces "the sort of sterile formality" properly rejected by the vast majority of courts that have considered the question. *United States* v. *Belmont*, 715 F. 2d 459, 462 (CA9 1983), cert. denied, 465 U. S. 1022 (1984). Accordingly, I dissent.

ATASCADERO STATE HOSPITAL ET AL. *v.* SCANLON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-351. Argued March 25, 1985—Decided June 28, 1985

Respondent, who suffers from diabetes and has no sight in one eye, brought an action in Federal District Court against petitioners, alleging that petitioner California State Hospital denied him employment because of his physical handicap, in violation of § 504 of the Rehabilitation Act of 1973, and seeking compensatory, injunctive, and declaratory relief. Section 504 provides that no handicapped person shall, solely by reason of his handicap, be subjected to discrimination under any program receiving federal financial assistance under the Act. Section 505(a) makes available to any person aggrieved by any act of any recipient of federal assistance under the Act the remedies for employment discrimination set forth in Title VI of the Civil Rights Act of 1964. The District Court granted petitioners' motion to dismiss the complaint on the ground that respondent's claims were barred by the Eleventh Amendment. Ultimately, after initially affirming on other grounds and upon remand from this Court, the Court of Appeals reversed, holding that the Eleventh Amendment did not bar the action because the State by receiving funds under the Act had implicitly consented to be sued as a recipient under § 504.

Held: Respondent's action is proscribed by the Eleventh Amendment. Pp. 237-247.

(a) Article III, § 5, of the California Constitution, which provides that "[s]uits may be brought against the State in such manner and in such courts as shall be directed by law" does not constitute a waiver of the State's Eleventh Amendment immunity from suit in federal court. In order for a state statute or constitutional provision to constitute such a waiver, it must specify the State's intent to subject itself to suit in *federal court*. Article III, § 5, does not specifically indicate the State's willingness to be sued in federal court but appears simply to authorize the legislature to waive the State's sovereign immunity. P. 241.

(b) The Rehabilitation Act does not abrogate the Eleventh Amendment bar to suits against the States. Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself. Here, the general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. Pp. 242-246.

(c) The State's acceptance of funds and participation in programs funded under the Rehabilitation Act are insufficient to establish that it consented to suit in federal court. The Act falls far short of manifesting a clear intention to condition participation in programs under the Act on a State's consent to waive its constitutional immunity. Pp. 246–247.

735 F. 2d 359, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 247. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 302. STEVENS, J., filed a dissenting opinion, *post*, p. 304.

James E. Ryan, Deputy Attorney General of California, argued the cause for petitioners. With him on the briefs were *John K. Van de Kamp*, Attorney General, *Thomas E. Warriner*, Assistant Attorney General, *Anne S. Pressman*, Supervising Deputy Attorney General, and *G. R. Overton*, Deputy Attorney General.

Marilyn Holle argued the cause for respondent. With her on the brief were *Joseph Lawrence*, *J. LeVonne Chambers*, *Eric Schnapper*, and *Stanley Fleishman*.*

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether States and state agencies are subject to suit in federal court by litigants seeking retroactive monetary relief under § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794, or whether such suits are proscribed by the Eleventh Amendment.

**Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Assistant Attorney General Cooper*, *Charles Fried*, *Christopher J. Wright*, and *Walter W. Barnett* filed a brief for the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation et al. by *David L. Shapiro*, *Burt Neuborne*, *Charles S. Sims*, *Paul L. Hoffman*, and *Mark D. Rosenbaum*; for Senator Cranston et al. by *Bonnie Milstein*; and for the Disability and Employment Advocacy Project of the Employment Law Center by *Joan M. Graff* and *Robert Barnes*.

I

Respondent, Douglas James Scanlon, suffers from diabetes mellitus and has no sight in one eye. In November 1979, he filed this action against petitioners, Atascadero State Hospital and the California Department of Mental Health, in the United States District Court for the Central District of California, alleging that in 1978 the hospital denied him employment as a graduate student assistant recreational therapist solely because of his physical handicaps. Respondent charged that the hospital's discriminatory refusal to hire him violated § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794, and certain state fair employment laws. Respondent sought compensatory, injunctive, and declaratory relief.

Petitioners moved for dismissal of the complaint on the ground that the Eleventh Amendment barred the federal court from entertaining respondent's claims. Alternatively, petitioners argued that in a suit for employment discrimination under § 504 of the Rehabilitation Act, a plaintiff must allege that the primary objective of the federal assistance received by the defendants is to provide employment, and that respondent's case should be dismissed because he did not so allege. In January 1980, the District Court granted petitioners' motion to dismiss the complaint on the ground that respondent's claims were barred by the Eleventh Amendment. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed. *Scanlon* v. *Atascadero State Hospital*, 677 F. 2d 1271 (1982). It did not reach the question whether the Eleventh Amendment proscribed respondent's suit. Rather it affirmed the District Court on the ground that respondent failed to allege an essential element of a claim under § 504, namely, that a primary objective of the federal funds received by the defendants was to provide employment. *Id.*, at 1272.

Respondent then sought review by this Court. We granted certiorari, 465 U. S. 1095 (1984), vacated the judg-

ment of the Court of Appeals, and remanded the case for further consideration in light of *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624 (1984), in which we held that § 504's bar on employment discrimination is not limited to programs that receive federal aid for the primary purpose of providing employment. *Id.*, at 632–633. On remand, the Court of Appeals reversed the judgment of the District Court. It held that "the Eleventh Amendment does not bar [respondent's] action because the State, if it has participated in and received funds from programs under the Rehabilitation Act, has implicitly consented to be sued as a recipient under 29 U. S. C. § 794." 735 F. 2d 359, 362 (1984). Although noting that the Rehabilitation Act did not expressly abrogate the States' Eleventh Amendment immunity, the court reasoned that a State's consent to suit in federal court could be inferred from its participation in programs funded by the Act. The court based its view on the fact that the Act provided remedies, procedures, and rights against "any recipient of Federal assistance" while implementing regulations expressly defined the class of recipients to include the States. Quoting our decision in *Edelman* v. *Jordan*, 415 U. S. 651, 672 (1974), the court determined that the "'threshold fact of congressional authorization to sue a class of defendants which literally includes [the] States'" was present in this case. 735 F. 2d, at 361.

The court's decision in this case is in conflict with those of the Courts of Appeals for the First and Eighth Circuits. See *Ciampa* v. *Massachusetts Rehabilitation Comm'n*, 718 F. 2d 1 (CA1 1983); *Miener* v. *Missouri*, 673 F. 2d 969 (CA8), cert. denied, 459 U. S. 909 (1982). We granted certiorari to resolve this conflict, 469 U. S. 1032 (1984), and we now reverse.

II

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens

or Subjects of any Foreign State." As we have recognized, the significance of this Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III" of the Constitution. *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 98 (1984) *(Pennhurst II)*. Thus, in *Hans* v. *Louisiana*, 134 U. S. 1 (1890), the Court held that the Amendment barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the Amendment do not so provide.

There are, however, certain well-established exceptions to the reach of the Eleventh Amendment. For example, if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action. See, *e. g.*, *Clark* v. *Barnard*, 108 U. S. 436, 447 (1883).[1] Moreover, the Eleventh Amendment is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," that is, by Congress' power "to enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment." *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 456 (1976). As a result, when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States' consent. *Ibid.*

But because the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States,[2] this Court consistently has held

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[1] A State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program. In each of these situations, we require an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment. As we said in *Edelman* v. *Jordan*, 415 U. S. 651, 673 (1974), "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here."

[2] JUSTICE BRENNAN's dissent repeatedly asserts that established Eleventh Amendment doctrine is not "grounded on principles essential to the structure of our federal system or necessary to protect the cherished con-

that these exceptions apply only when certain specific conditions are met. Thus, we have held that a State will be deemed to have waived its immunity "only where stated 'by

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stitutional liberties of our people . . . ." *Post*, at 247–248; see also *post*, at 258, 302. We believe, however, that our Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution. See n. 3, *infra*. The Framers believed that the States played a vital role in our system and that strong state governments were essential to serve as a "counterpoise" to the power of the Federal Government. See, *e. g.*, The Federalist No. 17, p. 107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961). The "new evidence," discovered by the dissent in The Federalist and in the records of the state ratifying conventions, has been available to historians and Justices of this Court for almost two centuries. Viewed in isolation, some of it is subject to varying interpretations. But none of the Framers questioned that the Constitution created a federal system with some authority expressly granted the Federal Government and the remainder retained by the several States. See, *e. g.*, The Federalist Nos. 39, 45. The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.

The principle that the jurisdiction of the federal courts is limited by the sovereign immunity of the States "is, without question, a reflection of concern for the sovereignty of the States . . . ." *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279, 293 (1973) (MARSHALL, J., concurring in result). As the Court explained almost 65 years ago:

"That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against the State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification." *Ex parte New York*, 256 U. S. 490, 497 (1921) (citations omitted).

See also cases cited in n. 3, *infra*.

JUSTICE BRENNAN's dissent also argues that in the absence of jurisdiction in the federal courts, the States are "exemp[t] . . . from compliance

the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Edelman* v. *Jordan*, 415 U. S., at 673, quoting *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 171 (1909). Likewise, in determining whether Congress in exercising its Fourteenth Amendment powers has abrogated the States' Eleventh Amendment immunity, we have required "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" *Pennhurst II*, 465 U. S., at 99, quoting *Quern* v. *Jordan*, 440 U. S. 332, 342 (1979). Accord, *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279 (1973).

In this case, we are asked to decide whether the State of California is subject to suit in federal court for alleged violations of § 504 of the Rehabilitation Act. Respondent makes three arguments in support of his view that the Eleventh Amendment does not bar such a suit: first, that the State has waived its immunity by virtue of Art. III, § 5, of the California Constitution; second, that in enacting the Rehabilitation Act, Congress has abrogated the constitutional immunity of the States; third, that by accepting federal funds under the Rehabilitation Act, the State has consented to suit in federal court. Under the prior decisions of this Court, none of these claims has merit.

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with laws that bind every other legal actor in our Nation." *Post*, at 248. This claim wholly misconceives our federal system. As JUSTICE MARSHALL has noted, "the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tribunals*." *Employees* v. *Missouri Dept. of Public Health and Welfare*, *supra*, at 293–294 (concurring in result) (emphasis added). It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land. See *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 341–344 (1816). See also *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976), and *post*, at 256, n. 8.

III

Respondent argues that the State of California has waived its immunity to suit in federal court, and thus the Eleventh Amendment does not bar this suit. See *Clark* v. *Barnard*, 108 U. S. 436 (1883). Respondent relies on Art. III, § 5, of the California Constitution, which provides: "Suits may be brought against the State in such manner and in such courts as shall be directed by law." In respondent's view, unless the California Legislature affirmatively imposes sovereign immunity, the State is potentially subject to suit in any court, federal as well as state.

The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one. Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment. *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 150 (1981) *(per curiam)*. As we explained just last Term, "a State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst II*, *supra*, at 99. Thus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*. See *Smith* v. *Reeves*, 178 U. S. 436, 441 (1900); *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47, 54 (1944). In view of these principles, we do not believe that Art. III, § 5, of the California Constitution constitutes a waiver of the State's constitutional immunity. This provision does not specifically indicate the State's willingness to be sued in federal court. Indeed, the provision appears simply to authorize the legislature to waive the State's sovereign immunity. In the absence of an unequivocal waiver specifically applicable to federal-court jurisdiction, we decline to find that California has waived its constitutional immunity.

IV

Respondent also contends that in enacting the Rehabilitation Act, Congress abrogated the States' constitutional immunity. In making this argument, respondent relies on the pre- and post-enactment legislative history of the Act and inferences from general statutory language. To reach respondent's conclusion, we would have to temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court. *Pennhurst II*, *supra*, at 99; *Quern* v. *Jordan*, *supra*, at 342–345. We decline to do so, and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. The fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion.

Only recently the Court reiterated that "the States occupy a special and specific position in our constitutional system . . . ." *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 547 (1985). The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties." *Id.*, at 572 (POWELL, J., dissenting). By guaranteeing the sovereign immunity of the States against suit in federal court, the Eleventh Amendment serves to maintain this balance. "Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst II*, *supra*, at 99.

Congress' power to abrogate a State's immunity means that in certain circumstances the usual constitutional balance between the States and the Federal Government does not obtain. "Congress may, in determining what is 'appropri-

ate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Fitzpatrick*, 427 U. S., at 456. In view of this fact, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty.

It is also significant that in determining whether Congress has abrogated the States' Eleventh Amendment immunity, the courts themselves must decide whether their own jurisdiction has been expanded. Although it is of course the duty of this Court "to say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), it is appropriate that we rely only on the clearest indications in holding that Congress has enhanced our power. See *American Fire & Cas. Co.* v. *Finn*, 341 U. S. 6, 17 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . .").

For these reasons, we hold—consistent with *Quern*, *Edelman*, and *Pennhurst II*—that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself.[3]

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[3] In a remarkable view of *stare decisis*, JUSTICE BRENNAN's dissent states that our decision today evinces a "lack of respect for precedent." *Post*, at 258. Not a single authority is cited for this claim. In fact, adoption of the dissent's position would require us to overrule numerous decisions of this Court. However one may view the merits of the dissent's historical argument, the principle of *Hans* v. *Louisiana*, 134 U. S. 1 (1890), that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III," *Pennhurst II*, 465 U. S., at 98, has been affirmed time and time again, up to the present day. *E. g.*, *North Carolina* v. *Temple*, 134 U. S. 22, 30 (1890); *Fitts* v. *McGhee*, 172 U. S. 516, 524 (1899); *Bell* v. *Mississippi*, 177 U. S. 693 (1900); *Smith* v. *Reeves*, 178

In light of this principle, we must determine whether Congress, in adopting the Rehabilitation Act, has chosen to override the Eleventh Amendment.[4] Section 504 of the Rehabilitation Act provides in pertinent part:

U. S. 436, 446 (1900); *Palmer* v. *Ohio*, 248 U. S. 32, 34 (1918); *Duhne* v. *New Jersey*, 251 U. S. 311, 313 (1920); *Ex parte New York*, 256 U. S., at 497; *Missouri* v. *Fiske*, 290 U. S. 18, 26 (1933); *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47, 51 (1944); *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459, 464 (1945); *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U. S. 299, 304, n. 13 (1952); *Parden* v. *Terminal Railway of Ala. Docks Dept.*, 377 U. S. 184, 186 (1964); *United States* v. *Mississippi*, 380 U. S. 128, 140 (1965); *Employees* v. *Missouri Public Health and Welfare Dept.*, 411 U. S., at 280; *Edelman* v. *Jordan*, 415 U. S., at 662–663; *Pennhurst II*, *supra*. JUSTICE BRENNAN long has maintained that the settled view of *Hans* v. *Louisiana*, as established in the holdings and reasoning of the above cited cases, is wrong. See, *e. g.*, *County of Oneida* v. *Oneida Indian Nation*, 470 U. S. 226, 254 (1985) (BRENNAN, J., dissenting in part); *Pennhurst II*, *supra*, at 125 (BRENNAN, J., dissenting); *Employees* v. *Missouri Dept. of Public Health and Welfare*, *supra*, at 298 (BRENNAN, J., dissenting); *Edelman* v. *Jordan*, 415 U. S., at 687 (BRENNAN, J., dissenting). It is a view, of course, that he is entitled to hold. But the Court has never accepted it, and we see no reason to make a further response to the scholarly, 55-page elaboration of it today.

In a dissent expressing his willingness to overrule *Edelman* v. *Jordan*, *supra*, as well as at least 16 other Supreme Court decisions that have followed *Hans* v. *Louisiana*, see *supra*, JUSTICE STEVENS would "further unrave[l] the doctrine of *stare decisis*," *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 155 (1981), because he views the Court's decision in *Pennhurst II* as "repudiat[ing] at least 28 cases." *Post*, at 304, citing *Pennhurst II*, *supra*, at 165–166, n. 50 (STEVENS, J., dissenting). We previously have addressed at length his allegation that the decision in *Pennhurst II* overruled precedents of this Court, and decline to do so again here. See *Pennhurst II*, *supra*, at 109–111, nn. 19, 20, and 21. JUSTICE STEVENS would ignore *stare decisis* in this case because in the view of a minority of the Court two prior decisions of the Court ignored it. This reasoning would indeed "unravel" a doctrine upon which the rule of law depends.

[4] Petitioners assert that the Rehabilitation Act of 1973 does not represent an exercise of Congress' Fourteenth Amendment authority, but was

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 87 Stat. 394, as amended and as set forth in 29 U. S. C. § 794.

Section 505, which was added to the Act in 1978, as set forth in 29 U. S. C. § 794a, describes the available remedies under the Act, including the provisions pertinent to this case:

> "(a)(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U. S. C. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.
>
> "(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The statute thus provides remedies for violations of § 504 by "*any* recipient of Federal assistance." There is no claim here that the State of California is not a recipient of federal

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enacted pursuant to the Spending Clause, Art. I, § 8, cl. 1. Petitioners conceded below, however, that the Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment. Thus, we first analyze § 504 in light of Congress' power under the Fourteenth Amendment to subject unconsenting States to federal court jurisdiction. See *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). In Part V, *infra*, at 246, we address the reasoning of the Court of Appeals and conclude that by accepting funds under the Act, the State did not "implicitly consen[t] to be sued . . . ." 735 F. 2d 359, 362 (1984).

aid under the statute. But given their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically. *Pennhurst II*, 465 U. S., at 99, citing *Quern* v. *Jordan*, 440 U. S. 332 (1979). Accordingly, we hold that the Rehabilitation Act does not abrogate the Eleventh Amendment bar to suits against the States.

V

Finally, we consider the position adopted by the Court of Appeals that the State consented to suit in federal court by accepting funds under the Rehabilitation Act.[5] 735 F. 2d, at 361–362. In reaching this conclusion, the Court of Appeals relied on "the extensive provisions [of the Act] under which the states are the express intended recipients of federal assistance." *Id.*, at 360. It reasoned that "this is a case in which a 'congressional enactment . . . by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities,' and 'the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity,'" *id.*, at 361, citing *Edelman* v. *Jordan*, 415 U. S., at 672. The Court of Appeals thus concluded that if the State "has participated in and received funds from programs under the Rehabilitation Act, [it] has implicitly consented to be sued as a recipient under 29 U. S. C. § 794." 735 F. 2d, at 362.

The court properly recognized that the mere receipt of federal funds cannot establish that a State has consented to suit

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[5] Although the Court of Appeals seemed to state that the Rehabilitation Act was adopted pursuant to § 5 of the Fourteenth Amendment, by focusing on whether the State consented to federal jurisdiction it engaged in analysis relevant to Spending Clause enactments.

in federal court. *Ibid.*, citing *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S., at 150; *Edelman* v. *Jordan*, *supra*, at 673. The court erred, however, in concluding that because various provisions of the Rehabilitation Act are addressed to the States, a State necessarily consents to suit in federal court by participating in programs funded under the statute. We have decided today that the Rehabilitation Act does not evince an unmistakable congressional purpose, pursuant to §5 of the Fourteenth Amendment, to subject unconsenting States to the jurisdiction of the federal courts. The Act likewise falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity. Thus, were we to view this statute as an enactment pursuant to the Spending Clause, Art. I, §8, see n. 4, *supra*, we would hold that there was no indication that the State of California consented to federal jurisdiction.

VI

The provisions of the Rehabilitation Act fall far short of expressing an unequivocal congressional intent to abrogate the States' Eleventh Amendment immunity. Nor has the State of California specifically waived its immunity to suit in federal court. In view of these determinations, the judgment of the Court of Appeals must be reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

If the Court's Eleventh Amendment doctrine were grounded on principles essential to the structure of our federal system or necessary to protect the cherished constitutional liberties of our people, the doctrine might be unobjectionable; the interpretation of the text of the Constitution in light of changed circumstances and unforeseen events—and with full regard for the purposes underlying the text—has always been the unique role of this Court. But the Court's

Eleventh Amendment doctrine diverges from text and history virtually without regard to underlying purposes or genuinely fundamental interests. In consequence, the Court has put the federal judiciary in the unseemly position of exempting the States from compliance with laws that bind every other legal actor in our Nation. Because I believe that the doctrine rests on flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect, I believe that the Court should take advantage of the opportunity provided by this case to reexamine the doctrine's historical and jurisprudential foundations. Such an inquiry would reveal that the Court, in Professor Shapiro's words, has taken a wrong turn.[1] Because the Court today follows this mistaken path, I respectfully dissent.

I

I first address the Court's holding that Congress did not succeed in abrogating the States' sovereign immunity when it enacted § 504 of the Rehabilitation Act, 29 U. S. C. § 794. If this holding resulted from the Court's examination of the statute and its legislative history to determine whether Congress intended in § 504 to impose an obligation on the States enforceable in federal court, I would confine my dissent to the indisputable evidence to the contrary in the language and history of § 504.

Section 504 imposes an obligation not to discriminate against the handicapped in "any program or activity receiving Federal financial assistance." This language is general and unqualified, and contains no indication whatsoever that an exemption for the States was intended. Moreover, state governmental programs and activities are undoubtedly the recipients of a large percentage of federal funds.[2] Given this

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[1] See Shapiro, Wrong Turns: The Eleventh Amendment and the *Pennhurst* Case, 98 Harv. L. Rev. 61 (1984).

[2] For instance, in 1972–1973, the year in which Congress was considering § 504, state governments received over $31 billion in revenue from the

widespread state dependence on federal funds, it is quite incredible to assume that Congress did not intend that the States should be fully subject to the strictures of § 504.

The legislative history confirms that the States were among the primary targets of § 504. In introducing the predecessor of § 504 as an amendment to Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, Representative Vanik clearly indicated that governments would be among the primary targets of the legislation: "Our Governments tax [handicapped] people, their parents and relatives, but fail to provide services for them. . . . The opportunities provided by the Government almost always exclude the handicapped." 117 Cong. Rec. 45974 (1971). He further referred approvingly to a federal-court suit against the State of Pennsylvania raising the issue of educational opportunities for the handicapped. See *id.*, at 45974–45975 (citing *Pennsylvania Assn. for Retarded Children* v. *Pennsylvania*, 343 F. Supp. 279 (ED Pa 1972), and characterizing it as a "suit against the State"). Two months later, Representative Vanik noted the range of state actions that could disadvantage the handicapped. He said that state governments "lack funds and facilities" for medical care for handicapped children and "favor the higher income families" in tuition funding. 118 Cong. Rec. 4341 (1972). He pointed out that "the States are unable to define and deal with" the illnesses of the handicapped child, and that "[e]xclusion of handicapped children [from public schools] is illegal in some States, but the States plead lack of funds." *Ibid.* Similarly, Senator Humphrey, the bill's sponsor in the Senate, focused particularly on a suit against a state-operated institution for the mentally retarded as demonstrating the need for the bill. See *id.*, at 9495, 9502.

The language used in the statute ("any program or activity receiving Federal financial assistance") has long been used

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Federal Government. By 1981–1982, this had grown to $66 billion. Bureau of the Census, Historical Statistics on Governmental Finances and Employment 34 (1982).

to impose obligations on the States under other statutory schemes. For example, Title VI, enacted in 1964, bans discrimination on the basis of race, color, or national origin by "any program or activity receiving Federal financial assistance." 42 U. S. C. §2000d. Soon after its enactment, seven agencies promulgated regulations that defined a recipient of federal financial assistance to include "any State, political subdivision of any State or instrumentality of any State or political subdivision." See, *e. g.*, 29 Fed. Reg. 16274, §15.2(e) (1964). See generally *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 463 U. S. 582, 618 (1983) (MARSHALL, J., dissenting). Over 40 federal agencies and every Cabinet Department adopted similar regulations. *Id.*, at 619. As Senator Javits remarked in the debate on Title VI, "[w]e are primarily trying to reach units of government, not individuals." 110 Cong. Rec. 13700 (1964).

Similarly Title IX of the Education Amendments of 1972, 20 U. S. C. §1681(a), prohibits discrimination on the basis of sex by "any education program or activity receiving Federal financial assistance." The regulations governing Title IX use the same definition of "recipient"—which explicitly includes the States—as do the Title VI regulations. See 34 CFR §106.2(h) (1985). The Congress that enacted §504 had the examples of Titles VI and IX before it, and plainly knew that the language of the statute would include the States.[3]

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[3] The Rehabilitation Act was amended in 1974, a year after its original enactment. Pub. L. 93–516, 88 Stat. 1617. The Senate Report that accompanied the amendment acknowledged that "Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, . . . and section 901 of the Education Amendments of 1974 *[sic]*." S. Rep. No. 93–1297, pp. 39–40 (1974). These amendments and their history "clarified the scope of §504" and "shed significant light on the intent with which §504 was enacted." *Alexander* v. *Choate*, 469 U. S. 287, 306–307, n. 27 (1985).

Implementing regulations promulgated for § 504 included the same definition of "recipient" that had previously been used to implement Title VI and Title IX. See 45 CFR § 84.3(f) (1984). In 1977, Congress held hearings on the implementation of § 504, and subsequently produced amendments to the statute enacted in 1978. Pub. L. 95–602, 92 Stat. 2982, § 505(a)(2), 29 U. S. C. § 794a. The Senate Report accompanying the amendments explicitly approved the implementing regulations. S. Rep. No. 95–890, p. 19 (1981). No Member of Congress questioned the reach of the regulations. In describing another section of the 1978 amendments which brought the Federal Government within the reach of § 504, Representative Jeffords noted that the section "applies 504 to the Federal Government as well as State and local recipients of Federal dollars." 124 Cong. Rec. 13901 (1978).[4] Representative Sarasin emphasized that "[n]o one should discriminate against an individual because he or she suffers from a handicap—not private employers, not State and local governments, and most certainly, not the Federal Government." *Id.*, at 38552.

The 1978 amendments also addressed the remedies for violations of § 504:

> "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U. S. C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." 29 U. S. C. § 794a(a)(2).

Again, the amendment referred in general and unqualified terms to "any recipient of Federal assistance." An addi-

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[4] Representative Jeffords also noted that "it did not seem right to me that the Federal Government should require States and localities to eliminate discrimination against the handicapped wherever it exists and remain exempt themselves." 124 Cong. Rec. 38551 (1978).

tional provision of the 1978 amendments made available attorney's fees to prevailing parties in actions brought to enforce § 504. Discussing these two provisions, Senator Cranston presupposed that States would be subject to suit under this section:

> "[W]ith respect to State and local bodies or State and local officials, attorney's fees, similar to other items of cost, would be collected from the official, in his official capacity from funds of his or her agency or under his or her control; or from the State or local government—regardless of whether such agency or Government is a named party." 124 Cong. Rec. 30347 (1978)

Given the unequivocal legislative history, the Court's conclusion that Congress did not abrogate the States' sovereign immunity when it enacted § 504 obviously cannot rest on an analysis of what Congress intended to do or on what Congress thought it was doing. Congress intended to impose a legal obligation on the States not to discriminate against the handicapped. In addition, Congress fully intended that whatever remedies were available against *other* entities—including the Federal Government itself after the 1978 amendments—be equally available against the States. There is simply not a shred of evidence to the contrary.

II

Rather than an interpretation of the intent of Congress, the Court's decision rests on the Court's current doctrine of Eleventh Amendment sovereign immunity, which holds that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III" of the Constitution. *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 98 (1984). Despite the presence of the most clearly lawless behavior by the state government, the Court's doctrine holds that the judicial authority of the United States

does not extend to suits by an individual against a State in federal court.

The Court acknowledges that the supposed lack of judicial power may be remedied, either by the State's consent,[5] or by express congressional abrogation pursuant to the Civil War Amendments, see *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976); *City of Rome* v. *United States*, 446 U. S. 156 (1980), or perhaps pursuant to other congressional powers. But the Court has raised formidable obstacles to congressional efforts to abrogate the States' immunity; the Court has put in place a series of special rules of statutory draftsmanship that Congress

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[5] The "stringent," see *ante*, at 241, test that the Court applies to purported state waivers of sovereign immunity is a mirror image of the test it applies to congressional abrogation of state sovereign immunity. Just as the Court today decides that Congress, if it desires effectively to abrogate a State's sovereign immunity, must do so expressly in the statutory language, so the Court similarly decides that a State's waiver, to be effective, must be "specifically applicable to federal-court jurisdiction." *Ibid.* In the Court's words, "[a]lthough a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment." *Ibid.* Ordinarily, a federal court is expected faithfully to decide state-law questions before it as the courts of a State would. I would think that a federal court deciding the scope of a state waiver of sovereign immunity should attempt to construe the state law of sovereign immunity as a state court would, making use of relevant legislative history and legal precedents. Yet, despite the absence of any identifiable federal interest that would justify a departure from state law, the Court eschews any effort to construe California's constitutional waiver requirement in accordance with California law. See, *e. g.*, *Muskopf* v. *Corning Hospital Dist.*, 55 Cal. 2d 211, 216, 359 P. 2d 457, 460 (1961) (abrogating state sovereign immunity for all tort cases and holding it to be an "anachronism, without rational basis, and exist[ing] only by the force of inertia"). *Id.*, at 216, 359 P. 2d, at 460. Instead, the Court seems to believe that the Eleventh Amendment justifies the Court in imposing on the state legislatures, as well as Congress, special rules of statutory draftsmanship if they would make a waiver of state sovereign immunity in federal court successful. Apparently, even States that want to make a federal forum available for the fair adjudication of grievances arising under federal law ought to be deterred from doing so.

must obey before the Court will accord recognition to its act. *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279 (1973), held that Congress must make its intention "clear" if it sought to lift the States' sovereign immunity conditional on their participation in a federal program. *Id.*, at 285. *Edelman* v. *Jordan*, 415 U. S. 651 (1974), made it still more difficult for Congress to act, stating that "we will find waiver only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Id.*, at 673. *Pennhurst State School and Hospital* v. *Halderman*, *supra*, required "an unequivocal expression of congressional intent." *Id.*, at 99. Finally, the Court today tightens the noose by requiring "that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language *in the statute itself.*" *Ante*, at 243 (emphasis added).

These special rules of statutory drafting are not justified (nor are they justifiable) as efforts to determine the genuine intent of Congress; no reason has been advanced why ordinary canons of statutory construction would be inadequate to ascertain the intent of Congress. Rather, the special rules are designed as hurdles to keep the disfavored suits out of the federal courts. In the Court's words, the test flows from the need to maintain "the usual constitutional balance between the States and the Federal Government." *Ante*, at 242.[6] The doctrine is thus based on a fundamental policy decision, vaguely attributed to the Framers of Article III or the Eleventh Amendment, that the federal courts ought not to hear suits brought by individuals against States. This Court executes the policy by making it difficult, but not impossible,

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[6] See also *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 99 (1984) ("Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system").

for Congress to create private rights of action against the States.[7]

Reliance on this supposed constitutional policy reverses the ordinary role of the federal courts in federal-question cases. Federal courts are instruments of the National Government, seeing to it that constitutional limitations are obeyed while interpreting the will of Congress in enforcing the federal laws. In the Eleventh Amendment context, however, the Court instead relies on a supposed constitutional policy disfavoring suits against States as justification for ignoring the will of Congress; the goal seems to be to obstruct the ability of Congress to achieve ends that are otherwise constitutionally unexceptionable and well within the reach of its Article I powers.

The Court's sovereign immunity doctrine has other unfortunate results. Because the doctrine is inconsistent with the

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[7] In this case, the Court's decision relentlessly to apply its "clear-statement rule" demonstrates how that rule serves no purpose other than obstructing the will of Congress. When Congress enacted § 504, it could have had no idea that it must obey the extreme clear-statement rule adopted by the Court for the first time today. The roots of that rule are found in *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279 (1973), which was decided on April 18, 1973. Cf. *Parden* v. *Terminal Railway of Ala. Docks Dept.*, 377 U. S. 184 (1964). The *Employees* case, of course, did not itself lay down the extreme rule adopted today. In any event, the bill which became § 504 had been first enacted six months previously. See 118 Cong. Rec. 35841 (Oct. 13, 1972) (enactment of bill by Senate); *id.*, at 36409 (Oct. 14, 1972) (enactment of bill by House). It was then vetoed by the President and reenacted in February 1973. See 119 Cong. Rec. 5901 (Feb. 28, 1973) (Senate); *id.*, at 7139 (Mar. 8, 1973) (House). Another veto followed, and the legislation was finally signed into law on September 26, 1973. See *id.*, at 29633 (Sept. 13, 1973) (Senate enactment of final bill); *id.*, at 30151 (Sept. 18, 1973) (House enactment of final bill). Given this chronology, for the Court now to hold that Congress did not abrogate the States' immunity because it did not "unequivocally express this intention in the statutory language" is to change the rules for lawmaking after Congress has already acted. Congress, like other officials, "cannot be expected to predict the future course of constitutional law." *Procunier* v. *Navarette*, 434 U. S. 555, 562 (1978).

essential function of the federal courts—to provide a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the land—it has led to the development of a complex body of technical rules made necessary by the need to circumvent the intolerable constriction of federal jurisdiction that would otherwise occur. Under the rule of *Ex parte Young*, 209 U. S. 123 (1908), a State may be required to obey federal law, so long as the plaintiff remembers to name a state official rather than the State itself as defendant, see *Alabama* v. *Pugh*, 438 U. S. 781 (1978), and so long as the relief sought is prospective rather than retrospective. *Edelman* v. *Jordan*, 415 U. S. 651 (1974).[8] These intricate rules often create manifest injustices while failing to respond to any legitimate needs of the States. A damages award may often be the only practical remedy available to the plaintiff,[9] and the threat of a damages award may be the only effec-

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[8] There are other rules created specifically to permit suits that would appear to be barred by any thoroughgoing interpretation of the Eleventh Amendment as a bar to exercise of the federal judicial power in suits against States. For instance, *Lincoln County* v. *Luning*, 133 U. S. 529, 530 (1890), established that the Eleventh Amendment is not a bar to suits against local governmental units. In addition, it seems to have been a longstanding, though unarticulated, rule that the Eleventh Amendment does not limit exercise of otherwise proper federal *appellate* jurisdiction over suits from state courts. For instance, in *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984), we adjudicated a taxpayer's appeal from an unfavorable judgment in a suit against state officials for refund of taxes. Cf. *Edelman* v. *Jordan*. Compare *Martinez* v. *California*, 444 U. S. 277 (1980) (adjudicating appeal of § 1983 action brought against State in state court) with *Quern* v. *Jordan*, 440 U. S. 332 (1979) (holding that § 1983 does not abrogate state sovereign immunity in federal court). See also *Williams* v. *Vermont*, 472 U. S. 14 (1985); *Summa Corp.* v. *California ex rel State Lands Comm'n*, 466 U. S. 198 (1984); *Aloha Airlines, Inc.* v. *Director of Taxation of Hawaii*, 464 U. S. 7 (1983); *Thomas* v. *Review Board of Ind. Employment Security Div.*, 450 U. S. 707 (1981); *Bonelli Cattle Co.* v. *Arizona*, 414 U. S. 313 (1973).

[9] In this case, for instance, damages may well be the only practical relief available for respondent. He originally brought suit in 1979 alleging that the State had improperly denied him employment as a graduate stu-

tive deterrent to a defendant's willful violation of federal law. Cf. *id.*, at 691–692 (MARSHALL, J., dissenting). While the prohibition of damages awards thus imposes substantial costs on plaintiffs and on members of a class Congress sought to protect, the injunctive relief that s permitted can often be more intrusive—and more expensive—than a simple damages award would be.[10]

The Court's doctrine itself has been unstable. As I shall discuss below, the doctrine lacks a textual anchor, a firm historical foundation, or a clear rationale. As a result, it has been impossible to determine to what extent the principle of state accountability to the rule of law can or should be accommodated within the competing framework of state nonaccountability put into place by the Court's sovereign immunity doctrine. For this reason, we have been unable to agree on the content of the special "rules" we have applied to Acts of Congress to determine whether they abrogate state sovereign immunity. Compare *Parden* v. *Terminal Railway of Ala. Docks Dept.*, 377 U. S. 184 (1964), with *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279 (1973). Whatever rule is decided upon at a given time is then applied *retroactively* to actions taken by Congress. See n. 7, *supra*. Finally, in the absence of any plau-

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dent assistant recreational therapist. Even if he had brought suit against state officials as well as the State itself, it is reasonable to suppose that now—six years later—he has attained his degree and would obtain no benefit from an injunction ordering the end of discrimination against the handicapped in hiring graduate student assistants. "For people in [Scanlon's] shoes, it is damages or nothing." *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 410 (1971).

[10] Congress, of course, may decide in a given case that a remedial scheme should be limited to either damages or injunctive relief. Cf. 42 U. S. C. § 2000a–3(a) (statute limiting remedy to "preventive" relief against *all* defendants). Our role in such a case is to interpret the will of Congress with respect to the scope of the permissible relief. In the Eleventh Amendment context, however, the Court seems to have decided that the supposed constitutional policy disfavoring suits against States justifies limiting the scope of relief regardless of the apparent will of Congress.

sible limiting principles, the Court has overruled and ignored past cases that seemed to stand in the way of vindication of the doubtful States' right the Court has created. See *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S., at 165–166, n. 50.

I might tolerate all of these results—the unprecedented intrusion on Congress' lawmaking power and consequent increase in the power of the courts, the development of a complex set of rules to circumvent the obviously untenable results that would otherwise ensue, the lack of respect for precedent and the lessons of the past evident in *Pennhurst*—if the Court's sovereign immunity doctrine derived from essential constitutional values protecting the freedom of our people or the structure of our federal system. But that is sadly not the case. Instead, the paradoxical effect of the Court's doctrine is to require the federal courts to protect States that violate federal law from the legal consequences of their conduct.

III

Since the Court began over a decade ago aggressively to expand its doctrine of Eleventh Amendment sovereign immunity, see *Employees* v. *Missouri Dept. of Public Health and Welfare*, *supra*, modern scholars and legal historians have taken a critical look at the historical record that is said to support the Court's result.[11] Recent research has discov-

[11] See, *e. g.*, Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983) (hereinafter Fletcher); Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889 (1983) (hereinafter Gibbons); C. Jacobs, The Eleventh Amendment and Sovereign Immunity (1972) (hereinafter Jacobs); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines, 126 U. Pa. L. Rev. 515, 1203 (1978) (hereinafter Field); Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413 (1975); Orth, The Interpretation of the Eleventh Amendment,

ered and collated substantial evidence that the Court's constitutional doctrine of state sovereign immunity has rested on a mistaken historical premise. The flawed underpinning is the premise that either the Constitution or the Eleventh Amendment embodied a principle of state sovereign immunity as a limit on the federal judicial power. New evidence concerning the drafting and ratification of the original Constitution indicates that the Framers never intended to constitutionalize the doctrine of state sovereign immunity. Consequently, the Eleventh Amendment could not have been, as the Court has occasionally suggested, an effort to reestablish a limitation on the federal judicial power granted in Article III. Nor, given the limited terms in which it was written, could the Amendment's narrow and technical language be understood to have instituted a sweeping new limitation on the federal judicial power whenever an individual attempts to sue a State. A close examination of the historical records reveals a rather different status for the doctrine of state sovereign immunity in federal court. There simply is no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against States from federal court.

A

In *Hans* v. *Louisiana*, 134 U. S. 1 (1890), the Court stated that to permit a citizen to bring a suit against a State in federal court would be "an attempt to strain the Constitution and the law to a construction never imagined or dreamed of." *Id.*, at 15. The text of the Constitution, of course, contains no explicit adoption of a principle of state sovereign immunity. The passage from *Hans* thus implies that everyone involved in the framing or ratification of the Constitution be-

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1798–1908: A Case Study of Judicial Power, 1983 U. Ill. L. Rev. 423; Shapiro, Wrong Turns: The Eleventh Amendment and the *Pennhurst* Case, 98 Harv. L. Rev. 61 (1984); Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1 (1972).

lieved that Article III included a tacit prohibition on the exercise of the judicial power when a State was being sued in federal court. The early history of the Constitution reveals, however, that the Court in *Hans* was mistaken. The unamended Article III was often read to the contrary to prohibit not the exercise of the judicial power, but the assertion of state sovereign immunity as a defense, even in cases arising solely under state law.

It is useful to begin with the text of Article III. Section 2 provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The judicial power of the federal courts thus extends only to certain types of cases, identified either by subject matter or parties. The subject-matter heads of jurisdiction include federal questions ("all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made") and admiralty ("all Cases of admiralty and maritime Jurisdiction"). The party-based heads of jurisdiction include what might be called ordinary diversity ("Controversies . . . between Citizens of different States"), state-citizen diversity ("between a State and Citizens of another State"), and state-alien diversity ("between a State . . . and foreign . . . Citizens"). It is the latter two clauses, providing for state-citizen and state-alien diversity, that were

at the focus of the Court's decision in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), and the subsequent ratification of the Eleventh Amendment.

To understand the dispute concerning the state-citizen and state-alien diversity clauses, it is crucial to understand the relationship between the party-based and subject-matter heads of jurisdiction. The grants of jurisdiction in Article III are to be read disjunctively. The federal judicial power may extend to a case if it falls within *any* of the enumerated jurisdictional heads. Thus, a federal court can hear a federal-question case even if the parties are citizens of the same state; it can exercise jurisdiction over cases between citizens of different states even where the case does not arise under federal law. Most important for present purposes, the language of the unamended Article III alone would permit the federal courts to exercise jurisdiction over suits in which a noncitizen or alien is suing a State on a claim of a violation of state law.

This standard interpretation of Article III gave a special importance to the interpretation of the state-citizen and state-alien diversity clauses. The clauses by their terms permitted federal jurisdiction over any suit between a State and a noncitizen or a State and an alien, and in particular over suits in which the plaintiff was the noncitizen or alien and the defendant was the State. Yet in most of the States in 1789, the doctrine of sovereign immunity formally forbade the maintenance of suits against States in state courts, although the actual effect of this bar in frustrating legal claims against the State was unclear.[12] Thus, the question left open by the terms of the two clauses was whether the state law of

[12] Professor Jaffe has explained that the doctrine of sovereign immunity in English practice prior to 1789 rarely was a bar to effective relief for those who had legitimate claims against the government. See Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963). Judge Gibbons' recent essay similarly points out that the doctrine of sovereign immunity in the Colonies may also have had a very limited scope. See Gibbons, at 1895–1899.

sovereign immunity barred the exercise of the federal judicial power.

A plaintiff seeking federal jurisdiction against a State under the state-citizen or state-alien diversity clauses would be asserting a cause of action based on state law, since a federal question or admiralty claim would provide an independent basis for jurisdiction that did not depend on the identity of the parties. To read the two clauses to abrogate the state-law sovereign immunity defense would be to find in Article III a substantive federal limitation on state law. Although a State previously could create a cause of action to which it would not itself be liable, this same cause of action now could be used (at least by citizens of other States or aliens) in federal courts to sue the State itself. This was a particularly troublesome prospect to the States that had incurred debts, some of which dated back to the Revolutionary War. The debts would naturally find their way into the hands of noncitizens and aliens, who at the first sign of default could be expected promptly to sue the State in federal court. The State's effort to retain its sovereign immunity in its own courts would turn out to be futile. Moreover, the resulting abrogation of sovereign immunity would operate retroactively; even debts incurred years before the Constitution was adopted—and before either of the contracting parties expected that a judicial remedy against the State would be available—would become the basis for causes of action brought under the two clauses in federal court.

In short, the danger of the state-citizen and state-alien diversity clauses was that, if read to permit suits against States, they would have the effect of limiting state law in a way not otherwise provided for in the Constitution. The original Constitution prior to the Bill of Rights contained only a few express limitations on state power. Yet the States would now find in Article III itself a further limit on state action: Despite the fact that the State as sovereign had created a given cause of action, Article III would have made it impos-

sible for the State effectively to assert a sovereign immunity defense to that action.

The records of the Constitutional Convention do not reveal any substantial controversy concerning the state-citizen and state-alien diversity clauses.[13] The language of Article III,[14] which provides one guide to its meaning, is undoubtedly consistent with suits against States under both subject-matter heads of jurisdiction (for example, a suit arising out of federal law brought by a citizen against a State) and party-based heads of jurisdiction (for example, a suit brought under the state-citizen diversity clause itself). However, a federal-question suit against a State does not threaten to displace a prior state-law defense of sovereign immunity, because state-law defenses would not of their own force be applicable to federal causes of action. On the other hand, a state-citizen suit against a State does, as suggested above, threaten to displace any extant state-law sovereign immunity defense.

An examination of the debates surrounding the state ratification conventions proves more productive. The various

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[13] See Fletcher, at 1045–1046; Jacobs, at 14–20.

[14] As reported by the Committee on Detail, the original draft provided that "[t]he jurisdiction of the supreme tribunal shall extend . . . to *such* other cases, as the national legislature may assign, as involving the national peace and harmony, in the collection of the revenue[,] in disputes between citizens of different states[,] in disputes between a State & a Citizen or Citizens of another State[,] in disputes between different states; and in disputes, in which subjects or citizens of other countries are concerned[,] & in Cases of Admiralty Jurisdn." (angle brackets in source omitted). 2 M. Farrand, Records of the Federal Convention of 1787, pp. 146–147 (rev. ed. 1937) (hereinafter Farrand). This jurisdiction was to be appellate only, "except in . . . those instances, in which the legislature shall make it original." *Ibid.* Interestingly, the Committee's draft of Article III was in James Wilson's handwriting, but the state-citizen diversity clause was written in the margin by another Committee member, John Rutledge of South Carolina. See Putnam, How the Federal Courts were Given Admiralty Jurisdiction, 10 Cornell L. Q. 460, 467 (1925) (facsimile of original document).

references to state sovereign immunity all appear in discussions of the state-citizen diversity clause. Virtually all of the comments were addressed to the problem created by state debts that predated the Constitution, when the State's creditors may often have had meager judicial remedies in the case of default. Yet, even in this sensitive context, a number of participants in the debates welcomed the abrogation of sovereign immunity that they thought followed from the state-citizen and state-alien clauses. The debates do not directly address the question of suits against States in admiralty or federal-question cases, where federal law and not state law would govern. Nonetheless, the apparent willingness of many delegates to read the state-citizen clause as abrogating sovereign immunity in state-law causes of action suggests that they would have been even more willing to permit suits against States in federal-question cases, where Congress had authorized such suits in the exercise of its Article I or other powers.

The Virginia debates included the most detailed discussion of the state-citizen diversity clause.[15] The first to mention the clause explicitly was George Mason, an opponent of the new Constitution. After quoting the clause, he referred to a

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[15] A number of possible grounds for state liability existed in Virginia on the eve of that State's Ratification Convention. Aside from the problem of debts owed by the State, the Treaty of Paris of 1783, 8 Stat. 80, between Britain and the United States included a number of provisions that could subject the States to liability to British creditors. Article V of the Treaty recognized completed state confiscations, or escheats, of British property. Article VI, however, prohibited escheats that had not yet been completed. Virginia, like other States, had provided for the confiscation of debts owed to British creditors or the discharge of such debts by payment into the state treasury. See Gibbons, at 1903. The Treaty thus potentially subjected Virginia to substantial liability to British creditors trying to collect these debts, although enforcement of the Treaty's provisions was largely impossible under the Articles of Confederation. See generally *id.*, at 1899–1902, 1903–1908.

dispute about Virginia's confiscation of property belonging to Lord Fairfax.[16] He asserted:

> "Claims respecting those lands, every liquidated account, or other claim against this state, will be tried before the federal court. Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender? Will the states undergo this mortification? I think this power perfectly unnecessary. But let us pursue this subject farther. What is to be done if a judgment be obtained against a state? Will you issue a *fieri facias?* It would be ludicrous to say that you could put the state's body in jail. How is the judgment, then, to be enforced? A power which cannot be executed ought not to be granted." 3 Elliot's Debates, at 526–527.

Mason thus believed that the state-citizen diversity clause provided federal jurisdiction for suits against the States and would have the effect of abrogating the State's sovereign immunity defense in state-law causes of action for debt that would be brought in federal court.

Madison responded the next day:

> "[Federal] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts." *Id.*, at 533.

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[16] See also 3 J. Elliot, Debates on the Federal Constitution 529 (1891) (hereinafter Elliot's Debates) (further discussion of problem of land confiscation).

Madison seems to have believed that the Article III judicial power, at least under the state-citizen diversity clause, was limited to cases in which the States were plaintiffs. Although he does deny that "[i]t is in the power of individuals to call any State into court," this remark could be understood as an explication of current state law which he believed would not be displaced by the state-citizen diversity clause. His remarks certainly do not suggest that Congress, acting under its enumerated powers elsewhere in the Constitution, could not "call a state into court," or, again acting within its own granted powers, provide a citizen with the power to sue a State in federal court.

At any rate, the delegates were not wholly satisfied with Madison's explanation. Patrick Henry, an opponent of ratification, was the next speaker. Referring to Mason, he said: "My honorable friend's remarks were right, with respect to incarcerating a state. It would ease my mind, if the honorable gentleman would tell me the manner in which money should be paid, if, in a suit between a state and individuals, the state were cast." *Id.*, at 542. Returning to the attack on Madison, Henry had no doubt concerning the meaning of the state-citizen diversity clause:

> "As to controversies between a state and the citizens of another state, his construction of it is to me perfectly incomprehensible. He says it will seldom happen that a state has such demands on individuals. There is nothing to warrant such an assertion. But he says that the state may be plaintiff only. If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary—that the state can only be plaintiff. When the state is debtor, there is no reciprocity. It seems to me that

> gentlemen may put what construction they please on it. What! is justice to be done to one party, and not to the other?" *Id.*, at 543.

Edmund Pendleton, the President of the Virginia Convention and the next speaker, supported ratification but seems to have agreed with Henry that the state-citizen diversity clause would subject the States to suit in federal court. He said that "[t]he impossibility of calling a sovereign state before the jurisdiction of another sovereign state, shows the propriety and necessity of vesting this tribunal with the decision of controversies to which a state shall be a party." *Id.*, at 549.

John Marshall next took up the debate:

> "With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this contruction is warranted by the words. But, say they, there will be a partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another

> state, without the establishment of these tribunals?" *Id.*, at 555–556.

Marshall's remarks, like Madison's, appear to suggest that the state-citizen diversity clause could not be used to make an unwilling State a defendant in federal court. The reason seems to be that "it is not rational to suppose that the sovereign power should be dragged before a court." Of course, where the cause of action is based on state law, as it would be in a suit under the state-citizen diversity clause, the "sovereign power" whose law governed would be the State, and Marshall is consequently correct that it would be "irrational" to suppose that the sovereign could be forced to abrogate the sovereign immunity defense that its own law had created. However, where the cause of action is based on a federal law enacted pursuant to Congress' Article I powers, it would be far less clear that Marshall would have concluded that the State still retained the relevant "sovereignty"; in such a case, there is nothing "irrational" about supposing that the relevant sovereign—in this case, Congress—had subjected the State to suit.[17]

Marshall's observations did not go unanswered. Edmund Randolph, a member of the Committee of Detail at the Constitutional Convention and a proponent of the Constitution, referred back to Mason's remarks:

> "An honorable gentleman has asked, Will you put the body of the state in prison? How is it between independent states? If a government refuses to do justice to individuals, war is the consequence. Is this the bloody alternative to which we are referred. . . . I think, whatever the law of nations may say, that any doubt respecting the construction that a state may be plaintiff, and not

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[17] To interpret Marshall's remarks to endorse a principle of wholesale state immunity from suit on *any* cause of action—state or federal—in federal court would render them inconsistent with the views he later expressed as Chief Justice. See *infra*, at 292–299.

> defendant, is taken away by the words *where a state shall be a party.*" *Id.*, at 573.

Randolph was convinced that a State could be made a party defendant. Discussing some disputed land claims, he remarked: "One thing is certain—that . . . the remedy will not be sought against the settlers, but the state of Virginia. The court of equity will direct a compensation to be made by the state." *Id.*, at 574. Finally, he concluded his discussion: "I ask the Convention of the free people of Virginia if there can be honesty in rejecting the government because justice is to be done by it? . . . Are we to say that we shall discard this government because it would make us all honest?" *Id.*, at 575.[18] One of the purposes of Article III was to vest in the federal courts the power to settle disputes that might threaten the peace and unity of the Nation.[19] Randolph saw the danger of just this kind of internecine strife when a State reneges on debts owed to citizens of another State, and consequently applauded the extension of federal jurisdiction to avoid these consequences.

The Virginia Convention ratified the Constitution. The Madison and Marshall remarks have been cited as evidence of an inherent limitation on Article III jurisdiction. See, *e. g.*, *Edelman* v. *Jordan*, 415 U. S., at 660, n. 9; *Monaco* v. *Mississippi*, 292 U. S. 313, 323–325 (1934); *Hans* v. *Louisiana*, 134 U. S., at 14. Even if this adequately characterized the substance of their views, they were a minority of those given at the Convention. Mason, Henry, Pendleton, and Ran-

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[18] Before the discussion of the state-citizen clause initiated by Mason, Randolph had earlier made much the same point while summarizing his views of the Constitution: "I admire that part which forces Virginia to pay her debts." 3 Elliot's Debates, at 207.

[19] For example the draft of the Constitution referred to the Committee on Detail at the Convention had provided "[t]hat the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony." 2 Farrand, at 39.

dolph all took an opposing position.[20] Equally important, the entire discussion focused on the question of Virginia's liability for debts and land claims that predated the Constitution and clearly arose under Virginia law. The question that excited such interest was whether the state-citizen diversity clause itself abrogated the sovereign immunity defense that would be available to the State in a suit concerning these issues in state court.[21] The same issue arose in a few other state conventions, but did not receive the detailed attention that it did in Virginia.[22]

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[20] It has been suggested that the remarks of the opponents of the Constitution should be given less weight. However, the same argument could be made concerning the remarks of Madison and Marshall, especially in light of Marshall's later interpretation of Article III as Chief Justice. See *infra*, at 295. Their fervent desire for ratification could have led them to downplay the features of the new document that were arousing controversy. See Field, at 534.

[21] The only element of the debate that suggests a broader concern is the repeated reference to the problem of enforcing a judgment against the State. Of course, even these statements were made in the context of the discussion of the state-citizen diversity clause, and the participants in the debate may well not have had their attention directed to the need, ultimately vindicated by the Civil War, to enforce federal law against the States, regardless of the means necessary for enforcement. In any event, the Court has categorically rejected the difficulty of enforcing judgments against the States as ground for permitting States to avoid their obligations. It has long been established that a State may not claim sovereign immunity when it is sued by another State under the Article III State-State clause, see *South Dakota* v. *North Carolina*, 192 U. S. 286 (1904), or when it is sued by the United States. See *United States* v. *Texas*, 143 U. S. 621, 642–646 (1892). Moreover, the prospective and injunctive relief that is permitted in actions pleaded against a state official, see *Edelman* v. *Jordan*, 415 U. S. 651 (1974), may raise enforcement problems as difficult as those raised by a judgment for damages in a suit against a State. Cf. *Cooper* v. *Aaron*, 358 U. S. 1 (1958).

[22] For discussion of the state-citizen clause in other conventions, see Gibbons, at 1902–1903 (Pennsylvania), 1912–1914 (North Carolina); Fletcher, at 1050–1051; Jacobs, at 27–40 (Pennsylvania). In the Pennsylvania Convention, for instance, James Wilson approved of the state-citizen clause

The debate in the press sheds further light on the effect of the Constitution on state sovereign immunity. A number of influential anti-Federalist publications sounded the alarm at what they saw as the unwarranted extension of the federal judicial power worked by the state-citizen diversity clause. The "Federal Farmer," commonly identified as Richard Henry Lee of Virginia, was one influential and widely published anti-Federalist. He objected:

> "There are some powers proposed to be lodged in the general government in the judicial department, I think very unnecessarily, *I mean powers respecting questions arising upon the internal laws of the respective states.* It is proper the federal judiciary should have powers co-extensive with the federal legislature—that is, the power of deciding finally on the laws of the union. By Art. 3. Sect. 2. the powers of the federal judiciary are extended (among other things) to all cases between a state and citizens of another state—between citizens of different states—between a state or the citizens thereof, and foreign states, citizens of subjects. Actions in all these cases, except against a state government, are now brought and finally determined in the law courts of the states respectively; and as there are no words to exclude these courts of their jurisdiction in these cases, they will have concurrent jurisdiction with the inferior federal courts in them." 14 The Documentary History of the Ratification of the Constitution 40 (J. Kaminski & G. Saladino, eds., 1983) (hereinafter Documentary History) (emphasis added).[23]

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that had been drafted in his own Committee on Detail: "When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing." 2 Elliot's Debates, at 491.

[23] The essay cited here can also be found at 2 The Complete Anti-Federalist 245 (H. Storing ed. 1981). Professor Storing has questioned its attribution to Richard Henry Lee. *Id.*, at 214–216.

Later in the same essay, which was published and circulated in 1787 and 1788, see *id.*, at 14–17, the author becomes even more explicit:

> "How far it may be proper to admit a foreigner or the citizen of another state to bring actions against state governments, which have failed in performing so many promises made during the war, is doubtful: How far it may be proper so to humble a state, as to bring it to answer to an individual in a court of law is worthy of consideration; the states are now subject to no such actions; and this new jurisdiction will subject the states, and many defendants to actions, and processes, which were not in the contemplation of the parties, when the contract was made; all engagements existing between citizens of different states, citizens and foreigners, states and foreigners; and states and citizens of other states were made the parties contemplating the remedies then existing on the laws of the states—and the new remedy proposed to be given in the federal courts, can be founded on no principle whatever." *Id.*, at 41–42.

This discussion undoubtedly presupposes that States would be parties defendant in suits on state-law causes of action under the state-citizen diversity clause; the author objects to barring sovereign immunity defenses in cases "arising upon the internal laws of the respective states." However, the anti-Federalist author plainly also believes that the powers of the federal courts are to be coextensive with the powers of Congress. Thus, the deficiency of state-citizen diversity jurisdiction is not that it permits the federal courts to hear suits against States based on federal causes of action, but that it permits the federal courts to exercise jurisdiction beyond the lawmaking powers of Congress: it provides new remedies for state creditors "which were not in the contemplation of the parties, when the contract was made."

Another noted anti-Federalist writer who published under the pseudonym "Brutus" also attacked what he saw as the untoward implications of the state-citizen diversity clause:

> "I conceive the clause which extends the power of the judicial to controversies arising between a state and citizens of another state, improper in itself, and will, in its exercise, prove most pernicious and destructive.
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> "It is improper, because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted to.
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> . . . . .
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> "Every state in the union is largely indebted to individuals. For the payment of these debts they have given notes payable to the bearer. At least this is the case in this state. Whenever a citizen of another state becomes possessed of one of these notes, he may commence an action in the supreme court of the general government; and I cannot see any way in which he can be prevented from recovering.
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> . . . . .
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> "If the power of the judicial under this clause will extend to the cases above stated, it will, if executed, produce the utmost confusion, and in its progress, will crush the states beneath its weight. And if it does not extend to these cases, I confess myself utterly at a loss to give it any meaning." 2 The Complete Anti-Federalist 429–431 (H. Storing ed. 1981).

Other materials, from proponents and opponents of ratification, similarly view Article III jurisdiction as extending to suits against States.[24] Timothy Pickering, a Pennsylvania

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[24] See, *e. g.*, J. Main, The Antifederalists 157 (1961) (quoting 1788 letter raising question whether state-citizen diversity clause would not "expose

landowner who supported ratification and attended the Pennsylvania Convention, wrote:

> "The federal farmer, and other objectors, say the causes between a state & citizens of another state—between citizens of different states—and between a state, or the citizens thereof, and the citizens of subjects of foreign states, should be left, as they now are, to the decision of the particular state courts. The other cases enumerated in the constitution, seem to be admitted as properly cognizable in the *federal* courts. With respect to all the former, it may be said generally, that as the local laws of the several states may differ from each other—as particular states may pass laws unjust in their nature, or partially unjust as they regard foreigners and the citizens of other states, it seems to be a wise provision, which puts it in the power of such foreigners & citizens to resort to a court where they may reasonably expect to obtain *impartial* justice. . . . But there is a particular & very cogent reason for securing to *foreigners* a trial, either in the first instance, or by appeal, in a *federal* court. With respect to *foreigners*, all the states form but *one nation*. This *nation* is responsible for the conduct of all its members towards foreign nations, their citizens & subjects; and therefore ought to possess the

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every State to be sued in the New Court, on their public securities holden by Citizens of other States"); 13 Documentary History, at 434 (widely reprinted essay by Federalist Tench Coxe) ("[W]hen a trial is to be had between the citizens of any state and those of another, or the government of another, the private citizen will not be obliged to go into a court *constituted by the state*, with which, or with the citizens of which, *his dispute is. He can appeal to a disinterested federal court*"); 14 Documentary History, at 72 (pro-Federalist pamphlet published in Philadelphia and reprinted elsewhere) ("[States] will indeed have the privilege of oppressing *their own citizens* by bad laws or bad administration; but the moment the mischief extends beyond their own State, and begins to affect the citizens of other States[,] strangers, or the national welfare,—the salutary controul of the supreme power will check the evil, and restore *strength and security*, as well as *honesty and right*, to the offending state").

> power of doing justice to the latter. Without this power, a single state, or one of its citizens, might embroil the whole union in a foreign war." 14 Documentary History, at 204.

Pickering's comments are particularly revealing because, unlike the previous comments, they do not focus on the problem caused by the abrogation of sovereign immunity in state-law causes of action. In fact, his views seem to be consistent with the view that a federal court adjudicating a state-law claim should apply an applicable state-law sovereign immunity defense. Pickering justifies the existence of state-citizen diversity jurisdiction in part as a remedy for state laws that are unjust or unfair to noncitizens. Such laws would, of course, implicate the interests protected by the Privileges and Immunities Clause of Article IV. His comments, like those of the "Federal Farmer," thus suggest the recognized need for a federal forum to adjudicate cases implicating the guarantees of the Federal Constitution—even those cases in which a State is the defendant.

The Federalist Papers were written to influence the ratification debate in New York. In No. 81, Hamilton discussed the issue of state sovereign immunity in plain terms:

> "I shall take occasion to mention here, a supposition which has excited some alarm upon very mistaken grounds: It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation.
>
> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a sur-

> render of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." The Federalist No. 81, pp. 548–549 (J. Cooke ed. 1961) (emphasis in original).

Hamilton believed that the States could not be held to their debts in federal court under the state-citizen diversity clause. The Court has often cited the passage as support for its view that the Constitution, even before the Eleventh Amendment, gave the federal courts no authority to hear any case, under any head of jurisdiction, in which a State was an unconsenting defendant. See, *e. g.*, *Edelman* v. *Jordan*, 415 U. S., at 660–662, n. 9; *Hans* v. *Louisiana*, 134 U. S., at 12–13. A careful reading of this passage, however, in the context of Hamilton's views elsewhere in The Federalist, demonstrates precisely the opposite. In the cases arising under state law that would find their way into federal court under the state-

citizen diversity clause, a defense of state sovereign immunity would be as valid in federal court as it would be in state court. The States retained their full sovereign authority over state-created causes of action, as they did over their traditional sources of revenue. See The Federalist No. 32 (discussing taxation). On the other hand, where the Federal Government, in the "plan of the convention,"[25] had substantive lawmaking authority, the States no longer retained their full sovereignty and could be subject to suit in federal court.[26] In these areas, in which the Federal Government

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[25] Hamilton used the phrase "plan of the convention" frequently as a synonym for the Constitution. See The Federalist Concordance 403–404 (Engeman, Erler, & Hofeller, eds. 1980). In No. 32, the discussion of taxation to which Hamilton adverted in No. 81, Hamilton had said that "as the plan of the convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States." The Federalist No. 32, p. 200 (J. Cooke ed. 1961) (emphasis in original). The Constitution had not delegated to the National Government the general power to define defenses to state-law causes of action; consequently, nothing in Article III abrogated state sovereign immunity in state-law causes of action in federal or state courts. On the other hand, the Constitution *had* delegated to the National Government a series of enumerated powers, and had made federal laws enacted pursuant thereto the supreme law of the land. Therefore, the States had surrendered their immunity from suit on federal causes of action when the Constitution was ratified.

In No. 80, Hamilton discussed the need for the federal-question jurisdiction:

"What for instance would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention are prohibited from doing a variety of things; some of which are incompatible with the interests of the union, and others with the principles of good government." The Federalist No. 80, p. 350 (J. Cooke ed. 1961).

The constitutional mode for enforcing the federal laws, according to Hamilton, was the federal judiciary. *Ibid.* Again, insofar as the States have thus given up powers to the Federal Government in the "plan of the convention," they are no longer full sovereigns and may be subjected to suit.

[26] A number of scholars have noted comments by Hamilton elsewhere in The Federalist Papers that strongly suggest that he foresaw the necessity

had substantive lawmaking authority, Article III's federal-question grant of jurisdiction gave the federal courts power that extended just as far as the legislative power of Congress; as Hamilton had said in discussing the judicial power, "every government *ought to possess the means of executing its own provisions by its own authority*," The Federalist No. 80, p. 537 (J. Cooke ed. 1961) (emphasis in original).[27] To interpret Article III to impose an independent limit on the lawmaking power of Congress would be to turn the "plan of the convention" on its head.[28]

A sober assessment of the ratification debates thus shows that there was no firm consensus concerning the extent to which the judicial power of the United States extended to suits against States. Certain opponents of ratification, like

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for suits against States in federal court. See Fletcher, at 1048; Gibbons, at 1908–1912; Field, at 534–535.

[27] The view that the power of the federal courts under federal-question jurisdiction had to be congruent with the power of Congress to legislate under Article I is strongly supported by other writings of Hamilton, as well as by other comments made in defense of Article III. See, *e. g.*, The Federalist, No. 80, p. 535 (J. Cooke ed. 1961) ("If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number"); 3 Elliot's Debates, at 532 (remarks of Madison) ("With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to").

[28] One final piece of evidence concerning the meaning of the original Article III comes from the amendments proposed by the various state ratification conventions. The New York Convention submitted an amendment to the First Congress that "nothing in the Constitution now under consideration contained, is to be construed to authorize any suit to be brought against any state, in any manner whatever." 2 Elliot's Debates, at 409. This suggests at least that the New York delegates did not agree with Hamilton's reading of the state-citizen diversity clause. Virginia, North Carolina, Rhode Island, Massachusetts, and New Hampshire also proposed amendments that would have modified or eliminated the state-citizen diversity clause. See Fletcher, at 1051–1052. The felt need for such amendments suggests that the delegates to these conventions did not find such a limitation in Article III itself.

Mason, Henry, and the "Federal Farmer," believed that the state-citizen diversity clause abrogated state sovereign immunity on state causes of action and predicted dire consequences as a result. On the other hand, certain proponents of the Constitution, like Pendleton, Randolph, and Pickering, agreed concerning the interpretation of Article III but believed that this constituted an argument in favor of the new Constitution. Finally, Madison, Marshall, and Hamilton believed that a State could not be made a defendant in federal court in a state-citizen diversity suit. The majority of the recorded comments on the question contravene the Court's statement in *Hans*, see *supra*, at 259, that suits against States in federal court were inconceivable.[29]

Granted that most of the comments thus expressed a belief that state sovereign immunity would not be a defense to suit in federal court in state-citizen diversity cases, the question remains whether the debates evince a contemporary understanding concerning the amenability of States to suit under federal-question or other subject-matter grants of jurisdiction. Although this question received little direct attention, the debates permit some conclusions to be drawn. First, the belief that the state-citizen diversity clause abrogated state sovereign immunity in federal court implies that the federal question and admiralty clauses would have the same effect. It would be curious indeed if Article III abrogated a State's immunity on causes of action that arose under the State's own laws and over which the Federal Government had no legislative authority, but gave a State an absolute right to a sovereign immunity defense when it was charged with a violation of federal law. Second, even Hamilton, who believed that the state-citizen clause did not abrogate state sovereign immunity in federal court, also left substantial room for suits

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[29] Indeed, recent scholarship seems unanimously to agree that the weight of the evidence is against the Court's statement in *Hans*. See Jacobs, at 40; Field, at 531; Gibbons, at 1913–1914; Fletcher, at 1054.

against States when "the plan of the convention" required this result. Given the Supremacy Clause and the enumeration of congressional powers in Article I, "the plan of the convention" requires States to answer in federal courts for violations of duties lawfully imposed on them by Congress in the exercise of its Article I powers. Third, the repeated references by Hamilton and others to the need for the federal courts to be able to exercise jurisdiction that is as extensive as Congress' powers to legislate suggests that, if Congress had the substantive power under Article I to enact legislation providing rights of action against the States, the federal courts under Article III could be given jurisdiction to hear such cases.

B

After the ratification of the Constitution, Congress provided in § 13 of the First Judiciary Act, 1 Stat. 73, 80, that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction." The Act did not provide the federal courts with original federal-question jurisdiction, although it did in § 25 provide the Supreme Court with considerable jurisdiction over appeals in federal-question cases from state courts. Despite the controversy over the suability of the States, the provision of the Act giving the Supreme Court original jurisdiction under the state-citizen and state-alien diversity clauses surprisingly aroused little or no debate in Congress. See Fletcher, at 1053–1054.[30]

[30] The First Judiciary Act itself may well suggest Congress' understanding that States would be suable in federal court under the state-citizen diversity clause. Although § 13 of the Act did not differentiate between States as plaintiffs and States as defendants, the same section provided that the Supreme Court "shall have exclusively all such jurisdiction of suits or proceedings against ambassadors . . . as a court of law can have or exercise consistently with the law of nations." If Congress had thought that

Those with disputes against States had no doubt that state-citizen diversity jurisdiction gave them a remedy in federal court. The first case docketed in this Court was *Vanstophorst* v. *Maryland*, 2 Dall. 401 (1791), a suit by Dutch creditors who sought judgments to recover principal and interest on Revolutionary War loans to the State of Maryland. Although a number of other cases were brought against States prior to the passage of the Eleventh Amendment,[31] the most significant of course was *Chisholm* v. *Georgia*, 2 Dall. 419 (1793). *Chisholm* was an action in assumpsit by a citizen of South Carolina for the price of military goods sold to Georgia in 1777.[32] The case squarely presented the question whether a State could be sued in federal court.

The Court held that federal jurisdiction extended to suits against States under the state-citizen diversity clause. Each of the five sitting Justices delivered an opinion; only Justice Iredell was in dissent. Several features of *Chisholm* are

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States could not, or ought not, be suable in federal court under the state-citizen diversity clause, it easily could have provided that the Supreme Court shall exercise such jurisdiction against a State "as a court can have or exercise consistently with that state's law." In addition, elsewhere in the Act, Congress assigned jurisdiction over cases in which the United States was the *plaintiff*. See § 9, 1 Stat. 77 (district court jurisdiction of "all suits at common law where the United States sue" subject to jurisdictional amount); § 11, 1 Stat. 78 (circuit court jurisdiction of all civil suits where $500 or more is in dispute "and the United States are plaintiffs, or petitioners"). Congress exercised no such discrimination in assigning jurisdiction in cases "between a state and citizens of another state."

[31] See Mathis, The Eleventh Amendment: Adoption and Interpretation, 2 Ga. L. Rev. 207, 215–230 (1968) (discussing cases); Jacobs, at 41–47, 57–64 (same).

[32] The precise facts of *Chisholm* have been the subject of some scholarly dispute. Compare 1 C. Warren, The Supreme Court in United States History 93, n. 1 (1922) (plaintiff in *Chisholm* was executor asserting claim on behalf of estate of British citizen), with Mathis, 2 Ga. L. Rev., at 217–218 (plaintiff in *Chisholm* was executor of estate of South Carolina citizen). The traditional account, in which the plaintiff was identified as acting on behalf of a British citizen, may explain why the Eleventh Amendment modified the state-alien diversity clause as well as the state-citizen diversity clause.

crucial to an understanding of the meaning of the Eleventh Amendment. First, two members of the Committee on Detail that had drafted Article III at the Convention were involved in the *Chisholm* case. Both believed that a State could be sued in federal court. Edmund Randolph, Washington's Attorney General who had previously represented the plaintiff in *Vanstophorst* v. *Maryland*, *supra*, represented the *Chisholm* plaintiff and argued strongly that a State must be amenable to suit in federal court as a result of the plain words of Article III, 2 Dall., at 421, the necessity for enforcing the constitutional prohibitions on the States, *id.*, at 422, and the implicit consent to suit that occurred on ratification of the Constitution, *id.*, at 423. Justice James Wilson, another of the drafters of Article III, delivered a lengthy opinion in which he urged that sovereign immunity had no proper application within the new Republic. *Id.*, at 453–466.

Second, *Chisholm* was not a federal-question case. Although the case involved a contract, it was brought pursuant to the state-citizen diversity clause and not directly under the Contracts Clause of the Constitution. See *id.*, at 420 (argument of counsel).[33] The case thus squarely raised the issue whether a suit against a State based on a state-law cause of action that was not maintainable in state court could be brought in federal court pursuant to the state-citizen diversity clause. The case did *not* present the question whether a

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[33] Most likely, *Chisholm* could not have been brought directly under the Contracts Clause of the Constitution. Prior to *Fletcher* v. *Peck*, 6 Cranch 87 (1810), it was not at all clear that the Contracts Clause applied to contracts to which a State was a party. Moreover, the case involved a simple breach of contract, not a "law impairing the obligation of the contract" to which the Clause would have applied. See *Shawnee Sewerage & Drainage Co.* v. *Stearns*, 220 U. S. 462, 471 (1911); *Brown* v. *Colorado*, 106 U. S. 95, 98 (1882). Finally, it was certainly not clear at the time of *Chisholm* that the Contracts Clause provided a plaintiff with a private right of action for damages. *Chisholm* was thus a suit on a state-law cause of action in assumpsit against the State of Georgia pursuant to the state-citizen diversity clause.

State could be sued in federal court where the cause of action arose under federal law.

Third, even Justice Iredell's dissent did not go so far as to argue that a State could *never* be sued in federal court. He sketched his argument as follows:

> "I have now, I think, established the following particulars.—1st. That the Constitution, so far as it respects the judicial authority, can only be carried into effect by acts of the Legislature appointing Courts, and prescribing their methods of proceeding. 2d. That Congress has provided no new law in regard to this case, but expressly referred us to the old. 3d. That there are no principles of the old law, to which we must have recourse, that in any manner authorize the present suit, either by precedent or by analogy." *Id.*, at 449.

He thus accurately perceived that the question presented was whether Article III itself created a cause of action in federal court to displace state law where a State was being sued. Because he believed that it did not, and because he found no *other* source of law on which the State could be held liable in the case, he believed that the suit could not be maintained.[34]

The decision in *Chisholm* was handed down on February 18, 1793. On February 19, a resolution was introduced in the House of Representatives stating:

> "[N]o State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the

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[34] Justice Iredell added, in what he conceded to be dicta: "So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money." 2 Dall., at 449. He emphasized, however, that he need not decide this broader question: "This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial." *Id.*, at 450.

> suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States." 1 C. Warren, The Supreme Court in United States History 101 (rev. ed. 1937).[35]

Another resolution was introduced in the Senate on February 20. That resolution provided:

> "The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." 3 Annals of Cong. 651–652 (1793).

Congress then recessed on March 4, 1793, without taking any action on the proposed Amendment.

By the time Congress reconvened in December 1793, a suit had been brought against Massachusetts in the Supreme Court by a British Loyalist whose properties had been confiscated. *Vassal* v. *Massachusetts*.[36] Georgia had responded angrily to the decision in *Chisholm*, and the Massachusetts Legislature reacted to the suit against it by enacting a resolution calling for "the most speedy and effectual measures" to obtain a constitutional amendment, including a constitutional convention. Resolves of Massachusetts 28 (1793) (No. 45). Virginia followed with a similar resolution. Acts of Virginia 52 (1793). The issue had thus come to a head, and the Federalists who controlled Congress no doubt felt considerable pressure to act to avoid an open-ended constitutional convention.[37]

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[35] The resolution was not reported in the Annals of Congress, but was reported in contemporary newspaper accounts. See Gibbons, at 1926, n. 186.

[36] The case is unreported, but is discussed in 1 J. Goebel, History of the Supreme Court of the United States 734–735 (1971).

[37] For a more detailed explanation of the political situation facing the Washington administration and the Congress at the time, see Gibbons, at 1927–1932.

On January 2, 1794, a resolution was introduced, by a Senator whose identity is not now known, with the text of the Eleventh Amendment as it was ultimately enacted:

> "The Judicial power of the United States shall not *be construed to* extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." 4 Annals of Cong. 25 (1794) (emphasis added).

This differed from the original February 20 resolution only in the addition of the three italicized words. Senator Gallatin moved to amend the resolution to add the words "except in cases arising under treaties made under the authority of the United States" after "The Judicial power of the United States." *Id.*, at 30. After rejecting Gallatin's proposal, the Senate then rejected an amendment offered by an unknown Senator that would have forbidden suits against States only "where the cause of action shall have arisen before the ratification of this amendment." *Ibid.*[38] The Senate ultimately voted 23–2 in favor of the Amendment. *Ibid.*

In the House of Representatives, there was only one attempt to amend the resolution. The amendment would have added at the end of the Senate version the following language: "[w]here such State[s] shall have previously made provision in their own Courts, whereby such suit may be prosecuted to effect." *Id.*, at 476. This resolution, of course, would have ratified the *Chisholm* result that States could be sued under the state-citizen diversity clause, but would have given the States an opportunity to shift the litigation into

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[38] The Amendment read in full:

"The Judicial power of the United States extends to all cases in law and equity in which one of the United States is a party; but no suit shall be prosecuted against one of the United States by citizens of another State, or by citizens of subjects of a foreign State, where the cause of action shall have arisen before the ratification of this amendment."

their own courts. It was rejected, 77–8, and the House proceeded to ratify the Amendment by a vote of 81–9 on March 4, 1794. *Id.*, at 476–478. Although the chronology of ratification is somewhat unclear,[39] President Adams certified that it had been ratified four years later on January 8, 1798.

Those who have argued that the Eleventh Amendment was intended to constitutionalize a broad principle of state sovereign immunity have always elided the question of why Congress would have chosen the language of the Amendment as enacted to state such a broad principle. As shown above, there was—to say the least—no consensus at the time of the Constitution's ratification as to whether the doctrine of state sovereign immunity would have any application in federal court. Even if there had been such a consensus, however, the Eleventh Amendment would represent a particularly cryptic way to embody that consensus in the Constitution. Had Congress desired to enshrine state sovereign immunity in federal courts for all cases, for instance, it could easily have adopted the first resolution introduced on February 19, 1793, in the House. Alternatively, a strong sovereign immunity principle could have been derived from an amendment that merely omitted the last 14 words of the enacted resolution. See Gibbons, at 1927. However, it does not take a particularly close reading of the Eleventh Amendment to see that it stops far short of that. Article III had provided: "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State" and "between a State . . . and foreign . . . Citizens or Subjects." The Eleventh Amendment used the identical language in stating that the judicial power did not extend to "any suit in law or equity . . . against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State." The congruence of language suggests that the Amendment was

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[39] See Jacobs, at 67, nn. 95–99.

intended simply to adopt the narrow view of the state-citizen and state-alien diversity clauses; henceforth, a State could not be sued in federal court where the basis of jurisdiction was that the plaintiff was a citizen of another State or an alien.[40]

It may be argued that the true intentions of the Second Congress were revealed by its use of the words "shall not be

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[40] It might be argued that, because Congress rejected Senator Gallatin's proposal, which would have exempted treaty-based causes of action from the operation of the Amendment, Congress intended to leave intact no part of the federal-question jurisdiction that would potentially have left the States open to suit. This argument, however, is untenable. First, it ignores the language of the Amendment. If Congress were generally concerned with suits against States under *all* Article III heads of jurisdiction, it would have had no rational reason to direct the Eleventh Amendment only against suits by noncitizens or foreigners. Second, Congress may well have rejected Gallatin's proposal precisely because to adopt that proposal would have implied some limitation on the ability of the federal courts to hear nontreaty based federal-question claims. Thus, Congress' rejection of the proposal may well have been based on its desire to preserve the full contours of Article III federal-question jurisdiction, rather than on a desire to limit it. Third, the federal courts had no general original federal-question jurisdiction under the First Judiciary Act, although the Supreme Court did have substantial appellate federal-question jurisdiction over cases originating in state courts. In refusing in the First Judiciary Act to grant original federal-question jurisdiction to the federal courts, Congress had evidently decided that federal-question cases, even those arising out of the Treaty of Paris, should be heard in the first instance in state court. In deciding to enact the Eleventh Amendment to overrule *Chisholm*, Congress had decided that the state-citizen and state-alien clauses ought not permit suits against States in federal court. Given these two decisions, Congress had little reason to make an exception to both decisions for suits that arose out of the Treaty. Finally, the case of *Vassal* v. *Massachusetts*, in which a British Loyalist had brought a challenge under the state-alien clause to the State's confiscation of his property, had triggered a movement for a constitutional convention. See *supra*, at 284. By rejecting the Gallatin proposal, which would have authorized the *Vassal* suit, Congress no doubt acted in part to squelch the movement for an open-ended constitutional convention.

construed" in the text of the Amendment. According to this argument, Congress intended not merely to qualify the state-citizen and state-alien diversity clauses, but also to establish a rule of construction barring exercise of the federal jurisdiction in any case—even one otherwise maintainable under the subject-matter heads of jurisdiction—in which a noncitizen or alien was suing a State. This view at least is consistent with the language of the Amendment, and would lead to the conclusion that suits by noncitizens or aliens against a State are never permitted, while suits by a citizen are permissible.[41] Recent scholarship, however, suggests strongly that this view is incorrect. In particular, two other explanations for the use of these terms have been advanced. Some have argued that the words were a natural means for Congress to rebuke the Supreme Court for its construction of the words "between a State and citizens of another State" in *Chisholm;* no longer should those words be construed to extend federal jurisdiction to suits brought under that clause in which the State was a defendant. See, *e. g.*, Fletcher, at 1061–1062. Others have argued that the words were added to assure the retrospective application of the Eleventh Amendment. See, *e. g.*, Jacobs, at 68–69. Of course, if the latter meaning were intended, the words had their intended effect, for the Court dismissed cases pending on its docket under the state-citizen diversity clause when the Amendment was ratified. *E. g.*, *Hollingsworth* v. *Virginia*, 3 Dall. 378 (1798).[42]

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[41] When the Court is prepared to embark on a defensible interpretation of the Eleventh Amendment consistent with its history and purposes, the question whether the Amendment bars federal-question or admiralty suits by a noncitizen or alien against a State would be open. At the current time, as the text states, the commentators' arguments against this interpretation seem to me quite plausible.

[42] In any event, I find it much more plausible to leave the construction of these words somewhat unclear than to leave the construction of much of the Amendment a superfluity, as the Court's construction would do.

The language of the Eleventh Amendment, its legislative history, and the attendant historical circumstances all strongly suggest that the Amendment was intended to remedy an interpretation of the Constitution that would have had the state-citizen and state-alien diversity clauses of Article III abrogating the state law of sovereign immunity on state-law causes of action brought in federal courts. The economy of this explanation, which accounts for the rather legalistic terms in which the Amendment and Article III were written, does not require extravagant assumptions about the unexpressed intent of Congress and the state legislatures, and is itself a strong point in its favor. The original Constitution did not embody a principle of sovereign immunity as a limit on the federal judicial power. There is simply no reason to believe that the Eleventh Amendment established such a broad principle for the first time.

The historical record in fact confirms that, far from correcting the error made in *Chisholm*, the Court's interpretation of the Eleventh Amendment makes a similar mistake. The *Chisholm* Court had interpreted the state-citizen clause of Article III to work a major substantive change in state law, or at least in those cases arising under state law that found their way to federal court. The Eleventh Amendment corrected that error, and henceforth required that the party-based heads of jurisdiction in Article III be construed not to work this kind of drastic modification of state law. The Court's current interpretation of the Eleventh Amendment makes the opposite mistake, construing the Eleventh Amendment to work a major substantive change in federal law. According to the Court, the Eleventh Amendment imposes a substantive limit on the Necessary and Proper Clause of Article I, limiting the remedies that Congress may authorize for state violations of federal law. This construction suffers from the same defect as that of *Chisholm:* both construe the enumeration of heads of jurisdiction to impose substantive limits on lawmaking authority.

Article III grants a federal-question jurisdiction to the federal courts that is as broad as is the lawmaking authority of Congress. If Congress acting within its Article I or other powers creates a legal right and remedy, and if neither the right nor the remedy violates any provision of the Constitution outside Article III, then Congress may entrust adjudication of claims based on the newly created right to the federal courts—even if the defendant is a State. Neither Article III nor the Eleventh Amendment imposes an independent limit on the lawmaking authority of Congress. This view makes sense of the language, history, and purposes of Article III and of the Eleventh Amendment. It is also the view that was adopted in the earliest interpretations of the Amendment by the Marshall Court.

C

After the enactment of the Eleventh Amendment, the number of suits against States in the federal courts was largely curtailed. The Amendment itself had eliminated the constitutional basis for the provisions of the First Judiciary Act granting the Supreme Court original jurisdiction over suits against States by an alien or noncitizen. Because there was no general statutory grant of original federal-question jurisdiction to the federal courts,[43] suits against States would not arise under that head of jurisdiction.[44] Nonetheless, the Marshall Court did have a number of opportunities to confront the issue of state sovereign immunity. The Court's decisions reflect a consistent understanding of the limited effect of the Amendment on the structure of federal jurisdiction outside the state-citizen and state-alien diversity clauses. Because the Justices on the Marshall Court lived through the

[43] The Judiciary Act of 1801, 2 Stat. 89, did grant general federal-question jurisdiction to the federal circuit courts, but that grant was repealed one year later. 2 Stat. 132, 156 (1802).

[44] Nor could a suit against a State be brought under diversity jurisdiction, because a State is not a citizen of itself for such purposes. See *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482 (1894).

ratification of the Constitution, the decision in *Chisholm* v. *Georgia*, and the subsequent enactment of the Eleventh Amendment, the Marshall Court's views on the meaning of the Amendment should take on particular importance.

(1)

Admiralty was perhaps the most significant head of federal jurisdiction in the early 19th century. As Hamilton noted in a much-quoted passage from the Federalist Papers: "The most bigoted idolizers of State authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes." The Federalist No. 80, p. 538 (J. Cooke ed. 1961). Although few admiralty cases could be expected to arise in which the States were defendants, the Marshall Court in the few instances in which it confronted the issue showed a strong reluctance to construe the Eleventh Amendment to interfere with the admiralty jurisdiction of the federal courts.

In *United States* v. *Peters*, 5 Cranch 115 (1809), the Court adjudicated a controversy over whether certain funds, proceeds of an admiralty prize sale dating from the 1770's, belonged to the Commonwealth of Pennsylvania or to a private claimant. *Id.*, at 136–139. The Commonwealth claimed the money as the result of a state-court judgment in its favor, while the private claimant's claim was based on a judgment received from a national prize court established under the Articles of Confederation. The money claimed by the Commonwealth had been held by the State Treasurer, who had since died. Chief Justice Marshall, writing for the Court, held that the Eleventh Amendment did not interfere with the traditional common-law suit against a state official for recovery of funds held with notice of an adverse claim. According to Marshall, the suit could be maintained against the state official, even though the relief sought was a recovery of funds. Marshall carefully avoided deciding whether the Eleventh Amendment would have barred the action if it had been nec-

essary to bring it against the State itself: "If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion." *Id.*, at 139. Nonetheless, Marshall's construction of the Eleventh Amendment by preserving the essential remedy of a money judgment that, in effect, ran against the State, left federal admiralty jurisdiction intact.

Later that same year, Justice Bushrod Washington, who had sat on the *Peters* Court, heard a sequel to *Peters* that arose when the State resisted the execution of the *Peters* judgment. *United States* v. *Bright*, 24 F. Cas. 1232 (No. 14,647) (CC Pa. 1809). After agreeing with the *Peters* Court that the State Treasurer could be sued for the funds in his private capacity, he went on to note that the Eleventh Amendment in terms applies only to suits "in law or equity." Because the Framers of the Amendment did *not* add the words "or to cases of admiralty and maritime jurisdiction," *id.*, at 1236, the Amendment should not be construed to extend to admiralty cases.[45] Washington thus did not read the Amendment to require a broad constitutional prohibition of suits against States in federal court. Moreover, given the importance of admiralty jurisdiction at the time, Congress' failure to include admiralty suits in the express terms of the statute was unlikely to have been an oversight.

The Marshall Court again refused to hold that the Eleventh Amendment barred suits in admiralty against States in *Governor of Georgia* v. *Madrazo*, 1 Pet. 110 (1828). On ap-

[45] Justice Washington explained the exclusion of admiralty jurisdiction in part on the ground that admiralty proceedings are often *in rem* and that a judgment could thus be enforced without implicating the "delicate" question of how to execute a judgment against a State. *United States* v. *Bright*, 24 F. Cas., at 1236. Although this concern echoed some of the difficulties raised in the debate over ratification of the Constitution, the difficulty of executing a judgment against a State was ultimately rejected by the Court as a ground to expand state sovereign immunity in federal court. See *supra*, at 270, n. 21.

peal from a Federal Circuit Court decision, a claimant alleged that he, and not the State of Georgia, was entitled to the proceeds of a prize sale. Chief Justice Marshall, writing for the Court, held that the suit was in reality a suit against the State. Although the Governor was named as defendant, there was no allegation that he had violated any federal or state law, and thus "no case is made which justifies a decree against him personally." *Id.*, at 123. The Court then dismissed the case because the Circuit Court had no jurisdiction over it: "[I]f the 11th amendment to the Constitution, does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the Supreme Court." *Ibid.*[46]

Writing in 1833, Justice Joseph Story noted:

> "It has been doubted, whether this amendment extends to cases of admiralty and maritime jurisdiction, where the proceeding is *in rem* and not *in personam*. There, the jurisdiction of the court is founded upon the possession of the thing; and if the state should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor. Besides the language of the amendment is, that 'the judicial power of the United States shall not be construed to extend to any suit *in law or equity*.' But a suit in the admiralty is not, correctly speaking, a suit in law, or in equity; but is often spoken of in contradistinction to both." 3 J. Story, Commentaries on the Constitution of the United States 560–561 (1833).[47]

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[46] In 1833, the Court dismissed an original action brought by Madrazzo based on the same claim. *Ex parte Madrazzo*, 7 Pet. 627 (1833). The Court's one-paragraph opinion apparently dismissed the case on Eleventh Amendment grounds because it "is a mere personal suit against a state to recover proceeds in its possession." *Id.*, at 632. This was the only case dismissed by the Supreme Court on Eleventh Amendment grounds between *Hollingsworth* v. *Virginia*, 3 Dall. 378 (1798), and the Civil War.

[47] Justice Story cited *Peters*, *Bright*, and *Madrazzo* in support of his statement.

As Justice Story pointed out, the result of the early admiralty cases was that the Eleventh Amendment was not seen as an obstacle to the exercise of otherwise legitimate federal admiralty jurisdiction.

(2)

Until 1875, Congress did not endow the federal courts with general federal-question jurisdiction. Nonetheless, the Supreme Court had several opportunities to decide federal-question cases against States. In some of these, suit was brought against a State in state court and an appeal was taken to the Supreme Court. If the Eleventh Amendment had constitutionalized state sovereign immunity as a limit to the Article III federal judicial power, it would have operated as a limit on both original *and* appellate federal-question jurisdiction, for nothing in the text or subsequent interpretations of Article III suggests that the federal judicial power extends more broadly to hear appeals than to decide original cases.[48] Although the Court has largely ignored this consequence of its constitutional sovereign immunity doctrine,[49] it was a consequence that the Marshall Court squarely faced.

In *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), Chief Justice Marshall addressed the question of the effect of the Eleventh Amendment on the Supreme Court's appellate jurisdiction to review a criminal conviction obtained in a Virginia state court. Counsel for the State argued that either the original

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[48] See *Doremus* v. *Board of Education*, 342 U. S. 429 (1952) (Article III limits on federal jurisdiction apply to appeal of case from New Jersey state courts).

[49] Cf. *Smith* v. *Reeves*, 178 U. S. 436, 445 (1900) (State may consent to suit in its own courts "subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed or re-examined, as prescribed by the act of Congress, if it denies to the plaintiff any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States").

Constitution or the Eleventh Amendment denied the federal courts the power to hear such an appeal, in which a State was being "sued" for a writ of error in the Supreme Court. Marshall noted at the outset of his opinion for the Court that Article III provides federal jurisdiction "to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party." *Id.*, at 378. After repeating this principle several times,[50] the Chief Justice stated: "We think, then, that as the constitution originally stood, the appellate jurisdiction of this Court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party." *Id.*, at 405.

Marshall then went on to consider the applicability of the Eleventh Amendment. After holding that a criminal defendant's petition for a writ of error is not properly understood to be a suit "commenced" or "prosecuted" by an individual against a State, Marshall stated an alternative holding:

> "But should we in this be mistaken, the error does not affect the case now before the Court. If this writ of

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[50] The repetitions of this principle make the point unmistakably. He states that the judicial department "is authorized to decide all cases, of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party." 6 Wheat., at 382. "We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." *Id.*, at 383. "[W]e think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties." *Id.*, at 392. It is worth noting that the Court has often given a broad reading to Marshall's statements in the Virginia Ratification Convention, interpreting those statements to express Marshall's view that a constitutional doctrine of state sovereign immunity in federal courts was an element of the original understanding of Article III. See, *e. g.*, *Hans* v. *Louisiana*, 134 U. S. 1 (1890); *Monaco* v. *Mississippi*, 292 U. S. 313, 324 (1934). The Chief Justice's discussion in *Cohens*, however, demonstrates that it may be prudent to give his earlier statements the less expansive interpretation suggested *supra*, at 267–268.

> error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State.' It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen that, in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." *Id.*, at 412.[51]

Thus, the Marshall Court in *Cohens* squarely confronted the issue of the extent to which the Eleventh Amendment encroached on federal-question jurisdiction, and concluded that it made no encroachment at all. This result is not distinguishable on the ground that it concerned only the exercise of appellate, and not original, federal-question jurisdiction. As was made clear three years later in *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (1824):

> "In those cases in which original jurisdiction is given to the supreme court, the judicial power of the United States cannot be exercised in its appellate form. In every other case the power is to be exercised in its origi-

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[51] Marshall's statement is of course consistent with the view that the Eleventh Amendment bars federal-question jurisdiction over suits that are prosecuted against States by noncitizens or aliens, but does not bar federal jurisdiction over suits by citizens of the State being sued. But it is flatly inconsistent with the Court's current position that the Amendment, despite its language and history, should be interpreted as constitutionalizing a broad sovereign immunity principle. Like the discussion earlier in *Cohens*, it evinces the Marshall Court's understanding that the Eleventh Amendment was to be construed narrowly to accomplish the purpose for which it was adopted. It is worth noting that, when the troublesome case hypothesized in *Cohens*—in which a writ of error was taken by a *noncitizen* of a State—arose 10 years later, the Marshall Court reached the merits of the claim without even discussing any possible Eleventh Amendment bar. See *Worcester* v. *Georgia*, 6 Pet. 515 (1832). Although the Court in *Worcester* did not discuss the Eleventh Amendment issue, the issue was raised by the plaintiff in error. See *id.*, at 533–534.

> nal or appellate form, or both, as the wisdom of congress may direct. With the exception of these cases in which original jurisdiction is given to this court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the constitution. Original jurisdiction, so far as the constitution gives a rule, is co-extensive with the judicial power. We find in the constitution no prohibition to its exercise, in every case in which the judicial power can be exercised." *Id.*, at 820–821.

The Court continued, speaking of federal-question jurisdiction: "It would be a very bold construction to say that [the judicial] power could be applied in its appellate form only, to the most important class of cases to which it is applicable." *Ibid.*

Osborn itself involved several important Eleventh Amendment issues. The State of Ohio had seized bank notes and specie of the Bank of the United States pursuant to a statute imposing a tax on the Bank. The statute was evidently unconstitutional under the Court's holding in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). The Bank, which was treated as a private corporation and not a division of the Federal Government for purposes of the suit, obtained an injunction in federal court prohibiting the State from enforcing the tax and requiring the return of the seized funds. The State of Ohio appealed to the Supreme Court, relying in part on the Eleventh Amendment as a bar to the proceedings.

Chief Justice Marshall's opinion for the Court carefully explains that the sovereign immunity principles of the Eleventh Amendment have no application where the State is not a party of record:

> "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains

> the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record." 9 Wheat., at 857.

Technically, this principle does not address the question whether a suit may be brought against a State, but rather the question whether a suit is indeed to be understood as a suit against a State.[52] Nonetheless, it represents a narrow, technical construction of the Eleventh Amendment, and is thus of a piece with the immediately following language:

> "The amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a State, by the citizens of another State, or by aliens." *Id.*, at 857–858.

The restatement of the principle of *Cohens* demonstrates Marshall's understanding that neither Article III nor the Eleventh Amendment limits the ability of the federal courts to hear the full range of cases arising under federal law.

The lack of original federal-question jurisdiction, combined with the paucity of admiralty actions against the States, deprived the Marshall Court of the opportunity to rule often on the effect of the Eleventh Amendment on state sovereign immunity in federal court. Moreover, the Court's rulings demonstrate a certain reluctance squarely to decide the extent to which the States were suable in federal court. This was perhaps a result of the Court's sensitivity to the unpopular decision in *Chisholm* v. *Georgia*, the lack of effective governmental power to enforce its decisions, and the centripetal forces that were driving the Nation toward civil war. None-

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[52] This conclusion is in some tension with the Court's holding in *Governor of Georgia* v. *Madrazo*, 1 Pet. 110 (1828), discussed *supra*, at 292–293. But see 1 Pet., at 122–123. It has been suggested that the distinction between the cases is that there was no cause of action available under federal or admiralty law against the Governor personally in *Madrazo*, while the contrary was the case here. See Fletcher, at 1086–1087.

theless, a careful reading of the Marshall Court's precedents indicates that the Marshall Court consistently adopted narrow and technical readings of the Amendment's import and thus carefully retained the full measure of federal-question and admiralty jurisdiction.

IV

The Marshall Court's precedents, and the original understanding of the Eleventh Amendment, survived until near the end of the 19th century. In 1875, Congress gave the federal courts general original federal-question jurisdiction. 18 Stat. 470. For the first time, suits could now be brought against States in federal court based on the existence of a federal cause of action. In *Hans* v. *Louisiana*, 134 U. S. 1 (1890), a citizen of Louisiana sued his State for payment on some bonds that the state government had repudiated. The plaintiff claimed a violation of the Contracts Clause. The Court held in favor of the State and ordered the suit dismissed.

Hans has been taken to stand for the proposition that the Eleventh Amendment, despite its terms, bars the federal courts from hearing federal-question suits by citizens against their own State.[53] As I have argued before, the Court's ambiguous opinion need not be interpreted in this way. See *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S., at 313–315 (BRENNAN, J., dissenting). The *Hans* Court relied on Justice Iredell's dissent in *Chisholm*, which as noted above, *supra*, at 283, rested on the absence of a statutory cause of action for Mr. Chisholm against the State of Georgia and reserved the question of the constitutional status of state sovereign immunity. See *Hans*, 134 U. S., at 18–19. The Court further noted the "presumption that

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[53] For example, the Court today states that in *Hans*, "the Court held that the [Eleventh] Amendment barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the Amendment do not so provide." *Ante*, at 238.

no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the Constitution was adopted." *Id.*, at 18. The opinion can thus sensibly be read to have dismissed the suit before it on the ground that no federal cause of action supported the plaintiff's suit and that state-law causes of action would of course be subject to the ancient common-law doctrine of sovereign immunity.

Whether the Court's departure from a sound interpretation of the Eleventh Amendment occurred in *Hans* or only in later cases that misread *Hans*, however, is relatively unimportant. If *Hans* is a constitutional holding, it rests by its own terms on two premises.

First, the opinion cites the comments by Madison, Marshall, and Hamilton in the ratification debates. *Id.*, at 12–14. The Court concludes that permitting suits against States would be "startling and unexpected," *id.*, at 11, and would "strain the Constitution and the law to a construction never imagined or dreamed of." *Id.*, at 15. The historical record outlined above demonstrates that the Court's history was plainly mistaken. Numerous individuals at the time of the Constitution's ratification believed that it would have exactly the effect the *Hans* Court found unimaginable. Moreover, even the comments of Madison, Marshall, and Hamilton need not be taken to advocate a constitutional doctrine of state sovereign immunity. Read literally and in context, all three were explicitly addressed to the particular problem of the state-citizen diversity clause. All three were vitally concerned with the constitutionally unauthorized displacement of the state law of creditors' rights and remedies that would be worked by an incorrect reading of the state-citizen diversity clause. All three are fully consistent with a recognition that the Constitution neither abrogated nor instituted state sovereign immunity, but rather left the ancient doctrine as it found it: a state-law defense available in state-law causes of action prosecuted in federal court.

Second, the opinion relies heavily on the supposedly "anomalous" result that, if the Eleventh Amendment were read literally,

> "in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state." *Id.*, at 10.

Even if such an "anomaly" existed, it would not justify judicial rewriting of the Eleventh Amendment and Article III and the wholesale disregard of precedents. But in any event a close look at the historical record reveals that the "anomaly" can easily be avoided without a general expansion of a constitutionalized sovereign immunity doctrine. The Eleventh Amendment can and should be interpreted in accordance with its original purpose to reestablish the ancient doctrine of sovereign immunity in state-law causes of action based on the state-citizen and state-alien diversity clauses; in such a state-law action, the identity of the parties is not alone sufficient to permit federal jurisdiction. If federal jurisdiction is based on the existence of a federal question or some other clause of Article III, however, the Eleventh Amendment has no relevance. There is thus no Article III limitation on otherwise proper suits against States by citizens, noncitizens, or aliens, and no "anomaly" that requires such drastic "correction."

The Court has repeatedly relied on *Hans* as establishing a broad principle of state immunity from suit in federal court.[54] The historical record demonstrates that, if *Hans* was a con-

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[54] In *Ex parte New York*, 256 U. S. 490 (1921), the Court even extended *Hans* (or its view of *Hans*) to admiralty jurisdiction, thus overruling Justice Washington's 110-year-old holding that the Eleventh Amendment did not apply to admiralty actions. See *United States* v. *Bright*, 24 F. Cas. 1232 (No. 14,647) (CC Pa. 1809), discussed *supra*, at 292.

stitutional holding, it rested on misconceived history and misguided logic.[55]

The doctrine that has thus been created is pernicious. In an era when sovereign immunity has been generally recognized by courts and legislatures as an anachronistic and unnecessary remnant of a feudal legal system, see, *e. g.*, *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 57 (1944) (Frankfurter, J., dissenting); *Muskopf* v. *Corning Hospital Dist.*, 55 Cal. 2d 211, 359 P. 2d 457 (1961); W. Prosser, The Law of Torts 984–987 (4th ed. 1971), the Court has aggressively expanded its scope. If this doctrine were required to enhance the liberty of our people in accordance with the Constitution's protections, I could accept it. If the doctrine were required by the structure of the federal system created by the Framers, I could accept it. Yet the current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority.

I respectfully dissent.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

I, too, dissent and join JUSTICE BRENNAN's opinion. Its exhaustive historical review and analysis demonstrate the Eleventh Amendment error in which the Court today persists. As JUSTICE BRENNAN shows, if *Hans* v. *Louisiana*, 134 U. S. 1 (1890), is a constitutional holding, it then reads into the Amendment words that are not there and that can-

[55] If *Hans* was not a constitutional holding, however, its use of the Madison, Marshall, and Hamilton comments would be substantially more justifiable; the relevance of this material was simply to show that the common law did not recognize a cause of action on a debt against a sovereign. Since Congress had not created any such action, the Court justifiably refused to do so itself.

not be reconciled with any principled view of congressional power; JUSTICE BRENNAN is surely correct when he says, *ante*, at 302, that the case rests on "misconceived history and misguided logic." Thus, the Court today compounds a longstanding constitutional mistake. The shield against just legal obligations afforded the States by the Court's prevailing construction of the Eleventh Amendment as an "exemplification" of the rule of sovereign immunity, *ante*, at 239, n. 2, quoting *Ex parte New York*, 256 U. S. 490, 497 (1921), simply cannot be reconciled with the federal system envisioned by our Basic Document and its Amendments.

Indeed, though of more mature vintage, the Court's Eleventh Amendment cases spring from the same soil as the Tenth Amendment jurisprudence recently abandoned in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985). Both in its modern reading of *Hans*, *supra*, and in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), the Court, in derogation of otherwise unquestioned congressional power, gave broad scope to circumscribed language by reference to principles of federalism said to inform that language.* The intuition underlying *Hans* and its contemporary progeny is no truer to the federal structure or to a proper view of congressional power than was that underlying *National League of Cities*.

But I would dissent from the Court's spare opinion and predictable result on other grounds as well. There is no

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*See *Fry* v. *United States*, 421 U. S. 542, 557 (1975) (dissenting opinion) ("As it was not the Eleventh Amendment by its terms which justified the result in *Hans*, it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees. Both Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation").

need to expatiate on them here, where so much already has been written. It suffices to say that I adhere to the views expressed in the dissenting opinion in *Edelman* v. *Jordan*, 415 U. S. 651, 688 (1974). See also *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 151 (1981) (dissenting statement). Thus, I would affirm the judgment here on the ground that California, as a willing recipient of federal funds under the Rehabilitation Act, consented to suit when it accepted such assistance. And a fair reading of the statute and its legislative history indicates for me that Congress produced the Act in exercise of its power under § 5 of the Fourteenth Amendment and thereby abrogated any claim of immunity the State otherwise might raise.

JUSTICE STEVENS, dissenting.

Because my decision to join JUSTICE BRENNAN's dissent is a departure from the opinion I expressed in *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 151 (1981), a word of explanation is in order. As I then explained, notwithstanding my belief that *Edelman* v. *Jordan*, 415 U. S. 651 (1974), was incorrectly decided, see 450 U. S., at 151, n. 2, I then concluded that the doctrine of *stare decisis* required that *Edelman* be followed. Since then, however, the Court has not felt constrained by *stare decisis* in its expansion of the protective mantle of sovereign immunity—having repudiated at least 28 cases in its decision in *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 165–166, n. 50 (1984) (STEVENS, J., dissenting)—and additional study has made it abundantly clear that not only *Edelman*, but *Hans* v. *Louisiana*, 134 U. S. 1 (1890), as well, can properly be characterized as "egregiously incorrect." 450 U. S., at 153. I am now persuaded that a fresh examination of the Court's Eleventh Amendment jurisprudence will produce benefits that far outweigh "the consequences of further unraveling the doctrine of *stare decisis*" in this area of the law. *Id.*, at 155.

Syllabus

WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL. *v.* NATIONAL ASSOCIATION OF RADIATION SURVIVORS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 84–571. Argued March 27, 1985—Decided June 28, 1985

Title 38 U. S. C. § 3404(c) limits to $10 the fee that may be paid an attorney or agent who represents a veteran seeking benefits from the Veterans' Administration (VA) for service-connected death or disability. Appellees (two veterans' organizations, three individual veterans, and a veteran's widow) brought an action in Federal District Court claiming that the fee limitation denied them any realistic opportunity to obtain legal representation in presenting their claims to the VA and hence violated their rights under the Due Process Clause of the Fifth Amendment and under the First Amendment. The District Court agreed and entered a nationwide "preliminary injunction" barring appellants from enforcing the fee limitation.

Held:

1. This Court has jurisdiction of the appeal under 28 U. S. C. § 1252, which grants the Court jurisdiction over an appeal "from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." *McLucas* v. *DeChamplain*, 421 U. S. 21. The injunction at issue creates precisely the problem to which § 1252 was addressed—to have this Court directly review decisions involving the exercise of judicial power to impair the enforcement of an Act of Congress on constitutional grounds, where the decision has effects beyond the controversy before the court below—since it enjoins the operation of the fee limitation on constitutional grounds across the country and under all circumstances. Whether or not the injunction is framed as a "holding" of unconstitutionality is irrelevant, as long as it enjoined the statute's operation. Pp. 316–319.

2. The fee limitation provision of § 3404(c) does not violate the Due Process Clause of the Fifth Amendment. Pp. 319–334.

(a) Invalidation of the fee limitation would frustrate Congress' principal goal of wanting the veteran to get the entirety of the benefits award without having to divide it with an attorney. Invalidation would

also complicate a process that Congress wished to be as informal and nonadversarial as possible. Pp. 321–326.

(b) It would take an extraordinarily strong showing of probability of error in the VA's present benefits claim procedures—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law. No such showing was made out on the record before the District Court in this case. In light of the Government interests at stake, the evidence before the District Court as to the success rates in claims handled with or without lawyers shows no such great disparity as to warrant the inference that the fee limitation violates the Due Process Clause of the Fifth Amendment. And what evidence there is regarding complex cases falls far short of the kind that would warrant upsetting Congress' judgment that the present system is the manner in which it wished claims for veterans' benefits adjudicated. Pp. 326–334.

3. Nor does the fee limitation violate appellees' First Amendment rights. Appellees' First Amendment arguments are inseparable from their due process claim, which focused on the question whether the present process allows a claimant to make a meaningful presentation. Pp. 334–335.

589 F. Supp. 1302, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 336. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 338. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 358.

Mark I. Levy argued the cause for appellants. With him on the briefs were *Solicitor General Lee*, *Acting Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, and *William Kanter*.

Gordon P. Erspamer argued the cause and filed a brief for appellees National Association of Radiation Survivors et al. *Robert L. Gnaizda* filed a brief for appellee American G. I. Forum.*

**Joseph C. Zengerle* filed a brief for Disabled American Veterans as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation et al. by *Burt Neuborne*, *Charles S.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Title 38 U. S. C. § 3404(c) limits to $10 the fee that may be paid an attorney or agent who represents a veteran seeking benefits for service-connected death or disability. The United States District Court for the Northern District of California held that this limit violates the Due Process Clause of the Fifth Amendment, and the First Amendment, because it denies veterans or their survivors the opportunity to retain counsel of their choice in pursuing their claims. We noted probable jurisdiction of the Government's appeal, 469 U. S. 1085 (1984), and we now reverse.

I

Congress has by statute established an administrative system for granting service-connected death or disability benefits to veterans. See 38 U. S. C. § 301 *et seq.* The amount of the benefit award is not based upon need, but upon service connection—that is, whether the disability is causally related to an injury sustained in the service—and the degree of incapacity caused by the disability. A detailed system has been established by statute and Veterans' Administration (VA) regulation for determining a veteran's entitlement, with final authority resting with an administrative body known as the Board of Veterans' Appeals (BVA). Judicial review of VA decisions is precluded by statute. 38 U. S. C. § 211(a); *Johnson* v. *Robison*, 415 U. S. 361 (1974). The controversy in this case centers on the opportunity for a benefit applicant

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Sims, Alan L. Schlosser, and *Amitai Schwartz;* for the American Veterans Committee, Inc., by *Michael W. Beasley, Allan L. Kamerow, Lawrence E. Lewy*, and *Irving R. M. Panzer;* for the Federal Bar Association by *Alfred F. Belcuore;* for the Lawyers' Club of San Francisco by *Jerome Sapiro, Jr.*, and *Fred H. Altshuler;* for the National Association of Atomic Veterans by *Walter R. Allan, Karen J. Wegner*, and *Debra B. Keil;* for Vietnam Veterans of America by *Mary E. Baluss, Samuel M. Sipe, Jr., David F. Addlestone*, and *Barton F. Stichman;* and for Andrew Groza by *James Joseph Lynch, Jr.*

or recipient to obtain legal counsel to aid in the presentation of his claim to the VA. Section 3404(c) of Title 38 provides:

> "The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—
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> . . . . .
>
> "(2) shall not exceed $10 with respect to any one claim . . . ."

Section 3405 provides criminal penalties for any person who charges fees in excess of the limitation of § 3404.

Appellees here are two veterans' organizations, three individual veterans, and a veteran's widow.[1] The two veterans' organizations are the National Association of Radiation Survivors, an organization principally concerned with obtaining compensation for its members for injuries resulting from atomic bomb tests, and Swords to Plowshares Veterans Rights Organization, an organization particularly devoted to the concerns of Vietnam veterans. The complaint contains no further allegation with respect to the numbers of members in either organization who are veteran claimants. Appellees did not seek class certification.

Appellees contended in the District Court that the fee limitation provision of § 3404 denied them any realistic opportunity to obtain legal representation in presenting their claims to the VA and hence violated their rights under the Due Process Clause of the Fifth Amendment and under the First Amendment. The District Court agreed with the appellees on both of these grounds, and entered a nationwide "preliminary injunction" barring appellants from enforcing the fee limitation. 589 F. Supp. 1302 (1984). To understand fully the posture in which the case reaches us it is necessary to discuss the administrative scheme in some detail.

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[1] A fourth individual veteran plaintiff died during the pendency of the proceedings.

Congress began providing veterans pensions in early 1789, and after every conflict in which the Nation has been involved Congress has, in the words of Abraham Lincoln, "provided for him who has borne the battle, and his widow and his orphan." The VA was created by Congress in 1930, and since that time has been responsible for administering the congressional program for veterans' benefits. In 1978, the year covered by the report of the Legal Services Corporation to Congress that was introduced into evidence in the District Court, approximately 800,000 claims for service-connected disability or death and pensions were decided by the 58 regional offices of the VA. Slightly more than half of these were claims for service-connected disability or death, and the remainder were pension claims. Of the 800,000 total claims in 1978, more than 400,000 were allowed, and some 379,000 were denied. Sixty-six thousand of these denials were contested at the regional level; about a quarter of these contests were dropped, 15% prevailed on reconsideration at the local level, and the remaining 36,000 were appealed to the BVA. At that level some 4,500, or 12%, prevailed, and another 13% won a remand for further proceedings. Although these figures are from 1978, the statistics in evidence indicate that the figures remain fairly constant from year to year.

As might be expected in a system which processes such a large number of claims each year, the process prescribed by Congress for obtaining disability benefits does not contemplate the adversary mode of dispute resolution utilized by courts in this country. It is commenced by the submission of a claim form to the local veterans agency, which form is provided by the VA either upon request or upon receipt of notice of the death of a veteran. Upon application a claim generally is first reviewed by a three-person "rating board" of the VA regional office—consisting of a medical specialist, a legal specialist, and an "occupational specialist." A claimant is "entitled to a hearing at any time on any issue involved in a claim . . . ." 38 CFR § 3.103(c) (1984). Proceedings in front of the rating board "are ex parte in nature," § 3.103(a); no

Government official appears in opposition. The principal issues are the extent of the claimant's disability and whether it is service connected. The board is required by regulation "to assist a claimant in developing the facts pertinent to his claim," § 3.103(a), and to consider any evidence offered by the claimant. See § 3.103(b). In deciding the claim the board generally will request the applicant's Armed Service and medical records, and will order a medical examination by a VA hospital. Moreover, the board is directed by regulation to resolve all reasonable doubts in favor of the claimant. § 3.102.[2]

After reviewing the evidence the board renders a decision either denying the claim or assigning a disability "rating" pursuant to detailed regulations developed for assessing various disabilities. Money benefits are calculated based on the rating. The claimant is notified of the board's decision and its reasons, and the claimant may then initiate an appeal by

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[2] Title 38 CFR § 3.102 (1984) states:

"It is the defined and consistently applied policy of the Veterans Administration to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists by reason of the fact that the evidence does not satisfactorily prove or disprove the claim, yet a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not a justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants involving this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships."

filing a "notice of disagreement" with the local agency. If the local agency adheres to its original decision it must then provide the claimant with a "statement of the case"—a written description of the facts and applicable law upon which the board based its determination—so that the claimant may adequately present his appeal to the BVA. Hearings in front of the BVA are subject to the same rules as local agency hearings—they are *ex parte*, there is no formal questioning or cross-examination, and no formal rules of evidence apply. 38 CFR § 19.157 (1984). The BVA's decision is not subject to judicial review. 38 U. S. C. § 211(a).[3]

The process is designed to function throughout with a high degree of informality and solicitude for the claimant. There is no statute of limitations, and a denial of benefits has no formal res judicata effect; a claimant may resubmit as long as he presents new facts not previously forwarded. See 38 CFR §§ 3.104, 3.105 (1984). Although there are time limits for submitting a notice of disagreement and although a claimant may prejudice his opportunity to challenge factual or legal decisions by failing to challenge them in that notice, the time limit is quite liberal—up to one year—and the VA boards are instructed to read any submission in the light most favorable to the claimant. See 38 CFR §§ 19.129, 19.124, 19.121 (1984). Perhaps more importantly for present purposes, however, various veterans' organizations across the country make available trained service agents, free of charge, to assist claimants in developing and presenting their claims. These service representatives are contemplated by the VA statute, 38 U. S. C. § 3402, and they are recognized as an important part of the administrative scheme. Appellees' counsel agreed at argument that a representative is available for

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[3] Despite the general preclusion of judicial review with respect to VA benefits claims, this Court held in *Johnson* v. *Robison*, 415 U. S. 361 (1974), that the district courts have jurisdiction to entertain constitutional attacks on the operation of the claims systems.

any claimant who requests one, regardless of the claimant's affiliation with any particular veterans' group.[4]

In support of their claim that the present statutory and administrative scheme violates the Constitution, appellees submitted affidavits and declarations of 16 rejected claimants or recipients and 24 practicing attorneys, depositions of several VA employees, and various exhibits. The District Court held a hearing and then issued a 52-page opinion and order granting the requested "preliminary injunction."[5]

With respect to the merits of appellees' due process claim, the District Court first determined that recipients of service-connected death and disability benefits possess "property" interests protected by the Due Process Clause, see *Mathews* v. *Eldridge*, 424 U. S. 319 (1976) (recipients of Social Security benefits possess a protected "property" interest), and also held that *applicants* for such benefits possess such an interest. Although noting that this Court has never ruled on the latter question, the court relied on several opinions of the Court of Appeals for the Ninth Circuit holding, with respect to similar Government benefits, that applicants possess such an interest. See, *e. g.*, *Ressler* v. *Pierce*, 692 F. 2d 1212, 1214–1216 (1982) (applicants for federal rent subsidies).

The court then held that appellees had a strong likelihood of showing that the administrative scheme violated the due process rights of those entitled to benefits. In holding that the process described above was "fundamentally unfair," the court relied on the analysis developed by this Court in

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[4]The VA statistics show that 86% of all claimants are represented by service representatives, 12% proceed *pro se*, and 2% are represented by lawyers. App. 190. Counsel agreed at argument that the 12% who proceed *pro se* do so by their own choice.

[5]The District Court rejected appellants' argument that the question presented was controlled by this Court's summary affirmance in *Gendron* v. *Saxbe*, 389 F Supp. 1303 (DC Cal.), summarily aff'd *sub nom. Gendron* v. *Levi*, 423 U. S. 802 (1975). Because we noted probable jurisdiction and heard oral argument in order to decide this case on the merits there is no need for us to determine whether the District Court properly distinguished *Gendron*.

Mathews v. *Eldridge*, *supra*, in which we stated the factors that must be weighed in determining what process is due an individual subject to a deprivation:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U. S., at 335.

In applying this test the District Court relied heavily on appellees' evidence; it noted that the veterans' interest in receiving benefits was significant in that many recipients are disabled, and totally or primarily dependent on benefits for their support. 589 F. Supp., at 1315. With respect to the likelihood of error under the present system, and the value of the additional safeguard of legal representation, it first noted that some of the appellees had been represented by service agents and had been dissatisfied with their representation, and had sought and failed to obtain legal counsel due solely to the fee limitation. The court found that absent expert legal counsel claimants ran a significant risk of forfeiting their rights, because of the highly complex issues involved in some cases. VA processes, the court reasoned, allow claimants to waive points of disagreement on appeal, or to waive appeal altogether by failing to file the notice of disagreement; in addition, claimants simply are not equipped to engage in the factual or legal development necessary in some cases, or to spot errors made by the administrative boards. *Id.*, at 1319–1321.

With respect to whether the present process alleviated these problems, the court found that "neither the VA officials themselves nor the service organizations are providing the full array of services that paid attorneys might make avail-

able to claimants." *Id.*, at 1320. Even assuming that all VA personnel were willing to go out of their way for each claimant, a point which the court would not fully accept,[6] the court found that in any event the VA does not have the resources to permit the substantial investments of time that are necessary. The VA does not seek independent testimony that might establish service connection, or independent medical examinations with respect to disability.

In reaching its conclusions the court relied heavily on the problems presented by what it described as "complex cases"—a class of cases also focused on in the depositions. Though never expressly defined by the District Court, these cases apparently include those in which a disability is slow developing and therefore difficult to find service connected, such as the claims associated with exposure to radiation or harmful chemicals, as well as other cases identified by the deponents as involving difficult matters of medical judgment. Nowhere in the opinion of the District Court is there any estimate of what percentage of the annual VA caseload of 800,000 these cases comprise, nor is there any more precise description of the class. There is no question but what the 3 named plaintiffs and the plaintiff veteran's widow asserted such claims, and in addition there are declarations in the record from 12 other claimants who were asserting such claims. The evidence contained in the record, however, suggests that the sum total of such claims is extremely small; in 1982, for example, roughly 2% of the BVA caseload consisted of "agent orange" or "radiation" claims, and what evidence

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[6] The District Court in its opinion questioned "the extent to which it is possible to serve the interests of both the VA and claimants simultaneously," and suggested that there was a "conflict" and that "the VA personnel might feel some pressure to protect the government purse." 589 F. Supp., at 1320, n. 17. There is no indication of such bias in the record—quite the contrary. Nor are we willing to accept that administrative adjudicators are presumptively subject to such bias.

there is suggests that the percentage of such claims in the regional offices was even less—perhaps as little as 3 in 1,000.

With respect to the service representatives, the court again found the representation unsatisfactory. Although admitting that this was not due to any "lack of dedication," the court found that a heavy caseload and the lack of legal training combined to prevent service representatives from adequately researching a claim. Facts are not developed, and "it is standard practice for service organization representatives to submit merely a one to two page handwritten brief." *Id.*, at 1322.

Based on the inability of the VA and service organizations to provide the full range of services that a retained attorney might, the court concluded that appellees had demonstrated a "high risk of erroneous deprivation" from the process as administered. *Ibid.* The court then found that the Government had "failed to demonstrate that it would suffer any harm if the statutory fee limitation . . . were lifted." *Id.*, at 1323. The only Government interest suggested was the "paternalistic" assertion that the fee limitation is necessary to ensure that claimants do not turn substantial portions of their benefits over to unscrupulous lawyers. The court suggested that there were "less drastic means" to confront this problem.

Finally, the court agreed with appellees that there was a substantial likelihood that the fee limitation also violates the First Amendment. The court relied on this Court's decisions in *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217 (1967), and *Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964), as establishing "the principle that the First Amendment rights to petition, association and speech protect efforts by organizations and individuals to obtain effective legal representation of their constituents or themselves." 589 F. Supp., at 1324. This right to "adequate legal representation" or "meaningful access to courts," the court found, was infringed by the fee limitation—again

without substantial justification by the Government. *Id.*, at 1325–1326.

After reiterating the Government's failure of proof with respect to the likely harms arising from doing away with the fee limitation, the court entered a "preliminary injunction" enjoining the Government appellants from "enforcing or attempting to enforce in any way the provisions of 38 U. S. C. §§ 3404–3405 . . . ." *Id.*, at 1329. The injunction was not limited to the particular plaintiffs, nor was it limited to claims processed in the District of Northern California, where the court sits.

II

Before proceeding to the merits we must deal with a significant question as to our jurisdiction, one not raised by appellees in this Court. This appeal was taken under 28 U. S. C. § 1252, which grants this Court jurisdiction "from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." We have here an interlocutory decree in a civil action to which an officer of the United States is a party, and the only question is whether the District Court's decision "holds" an Act of Congress unconstitutional. The problem, of course, is that given that the court's opinion and order are cast in terms of a "preliminary injunction" the court only states that there is a "high likelihood of success" on the merits of appellees' claims, and does not specifically state that the fee limitation provision is unconstitutional.

We do not write on a clean slate. In *McLucas* v. *DeChamplain*, 421 U. S. 21 (1975), this Court similarly entertained an appeal from an order that granted a preliminary injunction and in the process held an Act of Congress unconstitutional. In holding that we had jurisdiction under § 1252 we noted that that section constitutes an "exception" to "the

policy . . . of minimizing the mandatory docket of this Court," and we went on to state:

> "It might be argued that, in deciding to issue the preliminary injunction, the District Court made only an interlocutory determination of appellee's probability of success on the merits and did not finally 'hold' the article unconstitutional. By its terms, however, § 1252 applies to interlocutory as well as final judgments, decrees, and orders, and this Court previously has found the section properly invoked when the court below has made only an interlocutory determination of unconstitutionality, at least if, as here, that determination forms the necessary predicate to the grant or denial of preliminary equitable relief." *Id.*, at 30.

We think this case is controlled by *McLucas*. It is true that in *McLucas* the District Court actually stated its holding that the statute was unconstitutional, whereas here the court's statements are less direct. But that is merely a semantic difference in this case; inasmuch as any conclusions reached at the preliminary injunction stage are subject to revision, *University of Texas* v. *Camenisch*, 451 U. S. 390, 395 (1981), it should make little difference whether the court stated conclusively that a statute was unconstitutional, or merely said it was likely, so long as the injunction granted enjoined the statute's operation. This Court's appellate jurisdiction does not turn on such semantic niceties. See also *California* v. *Grace Brethren Church*, 457 U. S. 393, 405 (1982) ("§ 1252 provides jurisdiction even though the lower court did not expressly declare a federal statute unconstitutional . . .").

Indeed, we note that the problem raised by the statute's use of the word "holding" may in any event be a bit of a red herring. In its original form § 1252 provided this Court with appellate jurisdiction over decisions "against the constitutionality of any Act of Congress," see Act of Aug. 24, 1937,

ch. 754, § 2, 50 Stat. 752;[7] although this language was changed when the provision was codified in 1948, so that § 1252 now grants jurisdiction from a decision *"holding* any Act of Congress unconstitutional," this change was effected without substantive comment, and absent such comment it is generally held that a change during codification is not intended to alter the statute's scope. See *Muniz* v. *Hoffman*, 422 U. S. 454, 467–474 (1975). Any fair reading of the decision at issue would conclude that it is "against the constitutionality" of § 3404, and we are loath to read an unheralded change in phraseology to divest us of jurisdiction here.

Finally, acceptance of appellate jurisdiction in this case is in accord with the purpose of the statutory grant. Last Term, in *Heckler* v. *Edwards*, 465 U. S. 870 (1984), we discussed § 1252's legislative history. We noted that in enacting § 1252 Congress sought to identify a category of important decisions adverse to the constitutionality of an Act of Congress—which decisions, because the United States or its agent was a party, had implications beyond the controversy then before the court—and to provide an expeditious means for ensuring certainty and uniformity in the enforcement of such an Act by establishing direct review over such decisions in this Court. *Id.*, at 879–883. *Edwards* teaches that the decisions Congress targeted for appeal under § 1252 were those which involved the exercise of judicial power to impair the enforcement of an Act of Congress on constitutional grounds, and that it was the constitutional question that Congress wished this Court to decide. As we pointed out in *McLucas*,

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[7] Act of Aug. 24, 1937, ch. 754, § 2, 50 Stat. 752, provided:

"In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party. . . ."

§ 1252 contemplates that this impairment can arise from interlocutory decrees, just as the original statute provided for appeal from decisions in "any proceedings." Cf. *Goldstein* v. *Cox*, 396 U. S. 471, 476 (1970) (28 U. S. C. § 1253 authorizes direct appeals from preliminary injunctions issued by three-judge courts). A single district judge's interlocutory decision on constitutional grounds that an Act of Congress should not be enforced frustrates the will of Congress in the short run just as surely as a final decision to that effect. By § 1252 Congress gave the Government the right of immediate appeal to this Court in such a situation so that only those district court injunctions which had been reviewed and upheld by this Court would continue to have such an effect. Cf. *Edwards*, *supra*. The injunction at issue here creates precisely the problem to which § 1252 was addressed, inasmuch as it enjoins the operation of the fee limitation on constitutional grounds, across the country and under all circumstances. Thus, whether or not the injunction here is framed as a "holding" of unconstitutionality we believe we have jurisdiction under § 1252.

III

Judging the constitutionality of an Act of Congress is properly considered "'the gravest and most delicate duty that this Court is called upon to perform,'" *Rostker* v. *Goldberg*, 453 U. S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U. S. 142, 148 (1927) (Holmes, J.)), and we begin our analysis here with no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government. Indeed one might think, if anything, that more deference is called for here; the statute in question for all relevant purposes has been on the books for over 120 years. Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 401–402 (1819). This deference to congressional judgment must be afforded even though the

claim is that a statute Congress has enacted effects a denial of the procedural due process guaranteed by the Fifth Amendment. *Schweiker* v. *McClure*, 456 U. S. 188 (1982); *Mathews* v. *Eldridge*, 424 U. S., at 349. We think that the District Court went seriously awry in assessing the constitutionality of § 3404.

Appellees' first claim, accepted by the District Court, is that the statutory fee limitation, as it bears on the administrative scheme in operation, deprives a rejected claimant or recipient of "life, liberty or property, without due process of law," U. S. Const., Amdt. 5, by depriving him of representation by expert legal counsel.[8] Our decisions establish that "due process" is a flexible concept—that the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur. See *Mathews*, *supra*, at 334; *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). In defining the process necessary to ensure "fundamental fairness" we have recognized that the Clause does not require that "the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error," *Mackey* v. *Montrym*, 443 U. S. 1, 13 (1979), and in addition we have emphasized that the marginal gains from affording an additional procedural safeguard often may be

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[8] The District Court held that applicants for benefits, no less than persons already receiving them, had a "legitimate claim of entitlement" to benefits if they met the statutory qualifications. The court noted that this Court has never so held, although this Court has held that a person receiving such benefits has a "property" interest in their continued receipt. See *Atkins* v. *Parker*, 472 U. S. 115, 128 (1985); *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). Since at least one of the claimants here alleged a diminution of benefits already being received, however, we must in any event decide whether "due process" under the circumstances includes the right to be represented by employed counsel. In light of our decision on that question, *infra*, at 334, we need not presently define what class would be entitled to the process requested.

outweighed by the societal cost of providing such a safeguard. See *Mathews*, 424 U. S., at 348.[9]

These general principles are reflected in the test set out in *Mathews*, which test the District Court purported to follow, and which requires a court to consider the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute procedural safeguards, and the government's interest in adhering to the existing system. *Id.*, at 335. In applying this test we must keep in mind, in addition to the deference owed to Congress, the fact that the very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Id.*, at 344; see also *Parham* v. *J. R.*, 442 U. S. 584, 612–613 (1979).

The Government interest, which has been articulated in congressional debates since the fee limitation was first enacted in 1862 during the Civil War, has been this: that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer. See *United States* v. *Hall*, 98 U. S. 343, 352–355 (1879). This purpose is reinforced by a similar absolute prohibition on compensation of any service organization repre-

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[9] See Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1276 (1975):

"It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving."

sentative. 38 U. S. C. 3402(b)(1). While Congress has recently considered proposals to modify the fee limitation in some respects, a Senate Committee Report in 1982 highlighted that body's concern that "any changes relating to attorneys' fees be made carefully so as not to induce unnecessary retention of attorneys by VA claimants and not to disrupt unnecessarily the very effective network of non-attorney resources that has evolved in the absence of significant attorney involvement in VA claims matters." S. Rep. No. 97–466, p. 49 (1982). Although this same Report professed the Senate's belief that the original stated interest in protecting veterans from unscrupulous lawyers was "no longer tenable," the Senate nevertheless concluded that the fee limitation should with a limited exception remain in effect, in order to "protect claimants' benefits" from being unnecessarily diverted to lawyers.[10]

In the face of this congressional commitment to the fee limitation for more than a century, the District Court had only this to say with respect to the governmental interest:

> "The government has neither argued nor shown that lifting the fee limit would harm the government in any way,

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[10] JUSTICE STEVENS' dissent quotes liberally from this same Senate Committee Report, *post*, at 365–366, apparently intending to suggest that the Committee determined that the fee limitation was no longer justified. The quote is taken out of context, and as such it is quite misleading. The bill with respect to which the Report was issued would have provided for the first time for limited judicial review of BVA decisions. To this end, the Committee determined that "some easing of the limitation on attorneys' fees" would be necessary to allow a claimant to pursue an effective appeal in the federal courts. *But the proposed bill retained the fee limitation for all VA proceedings up to and including the first denial of a claim by the BVA.* In the sections of the Report not quoted by JUSTICE STEVENS the Committee explained that the limitation was retained to "protect claimant's benefits," and because until judicial review was contemplated there was "no need" for attorneys. S. Rep. No. 97–466, p. 50 (1982). Finally, it is worth noting that in any event the proposed bill died in House Committee and thus was never enacted.

except as the paternalistic protector of claimants' supposed best interests. To the extent the paternalistic role is valid, there are less drastic means available to ensure that attorneys' fees do not deplete veterans' death or disability benefits." 589 F. Supp., at 1323.

It is not for the District Court or any other federal court to invalidate a federal statute by so cavalierly dismissing a long-asserted congressional purpose. If "paternalism" is an insignificant Government interest, then Congress first went astray in 1792, when by its Act of March 23 of that year it prohibited the "sale, transfer or mortgage . . . of the pension . . . [of a] soldier . . . before the same shall become due." Ch. 11, § 6, 1 Stat. 245. Acts of Congress long on the books, such as the Fair Labor Standards Act, might similarly be described as "paternalistic"; indeed, this Court once opined that "[s]tatutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual . . . ." *Lochner* v. *New York*, 198 U. S. 45, 61 (1905). That day is fortunately long gone, and with it the condemnation of rational paternalism as a legitimate legislative goal.

There can be little doubt that invalidation of the fee limitation would seriously frustrate the oft-repeated congressional purpose for enacting it. Attorneys would be freely employable by claimants to veterans' benefits, and the claimant would as a result end up paying part of the award, or its equivalent, to an attorney. But this would not be the only consequence of striking down the fee limitation that would be deleterious to the congressional plan.

A necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible. This is not to say that complicated factual inquiries may be rendered simple by the expedient of informality, but surely Congress desired that the proceedings be as

informal and nonadversarial as possible.[11] The regular introduction of lawyers into the proceedings would be quite unlikely to further this goal. Describing the prospective impact of lawyers in probation revocation proceedings, we said in *Gagnon* v. *Scarpelli*, 411 U. S. 778, 787–788 (1973):

> "The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself . . . may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual . . . . Certainly,

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[11] The District Court stated in its opinion that "both claimants and attorneys familiar with the VA system view that system as adversarial. . . ." 589 F. Supp., at 1321. In reaching this conclusion, the District Court referred to statements by two attorneys and two claimants. One of the attorneys was admitted to practice in California in 1978, but does not take claims before the VA because of the fee limitation. His familiarity with VA procedures was acquired as a certified representative before the VA for appellee Swords to Ploughshares during his time as a law student. The second attorney was admitted to practice in Wisconsin in 1981, and has been a staff member of appellee Swords to Ploughshares since 1980. His representation of veterans has been primarily before discharge boards, but in the course of this representation he has become familiar with VA rules and practices. Both stated that they regarded the VA procedures as "adversarial." Two claimants testified on the basis of their own experience, one that the VA had been "very adversarial" and the other that "the VA has opposed me at every turn. . . ."

Anecdotal evidence such as this may well be sufficient to support a finding by a judge or jury in litigation between private parties that a particular fact did or did not exist. But when we deal with a massive benefits program provided by Congress in which 800,000 claims per year are decided by 58 regional offices, and 36,000 claims are appealed to the BVA, it is simply not the sort of evidence that will permit a conclusion that the entire system is operated contrary to its governing regulations.

> the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, . . . a longer record, and the possibility of judicial review—will not be insubstantial."

We similarly noted in *Wolff* v. *McDonnell*, 418 U. S. 539, 570 (1974), that the use of counsel in prison disciplinary proceedings would "inevitably give the proceedings a more adversary cast . . . ."

Knowledgeable and thoughtful observers have made the same point in other language:

> "To be sure, counsel can often perform useful functions even in welfare cases or other instances of mass justice; they may bring out facts ignored by or unknown to the authorities, or help to work out satisfactory compromises. But this is only one side of the coin. Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the government to provide one—or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy.
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> . . . . . .
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> "These problems concerning counsel and confrontation inevitably bring up the question whether we would not do better to abandon the adversary system in certain areas of mass justice. . . . While such an experiment would be a sharp break with our tradition of adversary process, that tradition, which has come under serious general challenge from a thoughtful and distinguished judge, was not formulated for a situation in which many thousands of hearings must be provided each month."

Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1287–1290 (1975).

Thus, even apart from the frustration of Congress' principal goal of wanting the veteran to get the entirety of the award, the destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible. It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys. And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries.

We accordingly conclude that under the *Mathews* v. *Eldridge* analysis great weight must be accorded to the Government interest at stake here. The flexibility of our approach in due process cases is intended in part to allow room for other forms of dispute resolution; with respect to the individual interests at stake here, legislatures are to be allowed considerable leeway to formulate such processes without being forced to conform to a rigid constitutional code of procedural necessities. See *Parham* v. *J. R.*, 442 U. S., at 608, n. 16. It would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law. We have no hesitation in deciding that no such showing was made out on the record before the District Court.

As indicated by the statistics set out earlier in this opinion, more than half of the 800,000 claims processed annually by the VA result in benefit awards at the regional level. An additional 10,000 claims succeed on request for reconsideration at the regional level, and of those that do not, 36,000 are appealed to the BVA. Of these, approximately 16% succeed before the BVA. It is simply not possible to determine on this record whether any of the claims of the named plaintiffs, or of other declarants who are not parties to the action, were wrongfully rejected at the regional level or by the BVA, nor is it possible to quantify the "erroneous deprivations" among the general class of rejected claimants. If one regards the decision of the BVA as the "correct" result in every case, it follows that the regional determination against the claimant is "wrong" in the 16% of the cases that are reversed by the Board.

Passing the problems with quantifying the likelihood of an erroneous deprivation, however, under *Mathews* we must also ask what value the proposed additional procedure may have in reducing such error. In this case we are fortunate to have statistics that bear directly on this question, which statistics were addressed by the District Court. These unchallenged statistics chronicle the success rates before the BVA depending on the type of representation of the claimant, and are summarized in the following figures taken from the record. App. 568.

ULTIMATE SUCCESS RATES BEFORE THE BOARD OF VETERANS' APPEALS BY MODE OF REPRESENTATION

American Legion	16.2%
American Red Cross	16.8%
Disabled American Veterans	16.6%
Veterans of Foreign Wars	16.7%
Other nonattorney	15.8%
No representation	15.2%
Attorney/Agent	18.3%

The District Court opined that these statistics were not helpful, because in its view lawyers were retained so infrequently that no body of lawyers with an expertise in VA practice had developed, and lawyers who represented veterans regularly might do better than lawyers who represented them only *pro bono* on a sporadic basis. The District Court felt that a more reliable index of the effect lawyers would have on the proceedings was a statistical study showing success of various representatives in appeals to discharge review boards in the uniformed services—statistics that showed a significantly higher success rate for those claimants represented by lawyers as compared to those claimants not so represented.

We think the District Court's analysis of this issue totally unconvincing, and quite lacking in the deference which ought to be shown by any federal court in evaluating the constitutionality of an Act of Congress. We have the most serious doubt whether a competent lawyer taking a veteran's case on a *pro bono* basis would give less than his best effort, and we see no reason why experience in developing facts as to causation in the numerous other areas of the law where it is relevant would not be readily transferable to proceedings before the VA. Nor do we think that lawyers' success rates in proceedings before military boards to upgrade discharges—proceedings which are not even conducted before the VA, but before military boards of the uniformed services—are to be preferred to the BVA statistics which show reliable success by mode of representation in the very type of proceeding to which the litigation is devoted.

The District Court also concluded, apparently independently of its ill-founded analysis of the claim statistics, (1) that the VA processes are procedurally, factually, and legally complex, and (2) that the VA system presently does not work as designed, particularly in terms of the representation afforded by VA personnel and service representatives, and that these representatives are "unable to perform all of the services which might be performed by a claimant's own

paid attorney." 589 F. Supp., at 1322. Unfortunately the court's findings on "complexity" are based almost entirely on a description of the plan for administering benefits in the abstract, together with references to "complex" cases involving exposure to radiation or agent orange, or post-traumatic stress syndrome. The court did not attempt to state even approximately how often procedural or substantive complexities arise in the run-of-the-mine case, or even in the unusual case. The VA procedures cited by the court do permit a claimant to prejudice his rights by failing to respond in a timely manner to an agency notice of denial of an initial claim, but despite this possibility there is nothing in the District Court's opinion indicating that these procedural requirements have led to an unintended forfeiture on the part of a diligent claimant. On the face of the procedures, the process described by the District Court does not seem burdensome: one year would in the judgment of most be ample time to allow a claimant to respond to notice requesting a response. In addition, the VA is required to read any submission in the light most favorable to the claimant, and service representatives are available to see that various procedural steps are complied with. It may be that the service representative cannot, as the District Court hypothesized, provide all the services that a lawyer could, but there is no evidence in the record that they cannot or do not provide advice about time limits.

The District Court's opinion is similarly short on definition or quantification of "complex" cases. If this term be understood to include all cases in which the claimant asserts injury from exposure to radiation or agent orange, only approximately 3 in 1,000 of the claims at the regional level and 2% of the appeals to the BVA involve such claims. Nor does it appear that all such claims would be complex by any fair definition of that term: at least 25% of all agent orange cases and 30% of the radiation cases, for example, are disposed of because the medical examination reveals no disability. What evidence does appear in the record indicates that the great

majority of claims involve simple questions of fact, or medical questions relating to the degree of a claimant's disability; the record also indicates that only the rare case turns on a question of law. There are undoubtedly "complex" cases pending before the VA, and they are undoubtedly a tiny fraction of the total cases pending. Neither the District Court's opinion nor any matter in the record to which our attention has been directed tells us more than this.

The District Court's treatment of the likely usefulness of attorneys is on the same plane with its efforts to quantify the likelihood of error under the present system. The court states several times in its opinion that lawyers could provide more services than claimants presently receive—a fact which may freely be conceded—but does not suggest how the availability of these services would reduce the likelihood of error in the run-of-the-mine case. Simple factual questions are capable of resolution in a nonadversarial context, and it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment. Cf. *Parham* v. *J. R.*, 442 U. S., at 609–612. The availability of particular lawyers' services in so-called "complex" cases might be more of a factor in preventing error in such cases, but on this record we simply do not know how those cases should be defined or what percentage of all of the cases before the VA they make up. Even if the showing in the District Court had been much more favorable, appellees still would confront the constitutional hurdle posed by the principle enunciated in cases such as *Mathews* to the effect that a process must be judged by the generality of cases to which it applies, and therefore a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them. But here appellees have failed to make the very difficult factual showing necessary.[12]

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[12] Our understanding of the operation of the claims process is further bolstered by the findings of the Senate Committee alluded to earlier. As noted *supra*, at 322, that Committee conducted an extensive inquiry into

Reliable evidence before the District Court showed that claimants represented by lawyers have a slightly better success rate before the BVA than do claimants represented by service representatives, and that both have a slightly better success rate than claimants who were not represented at all. Evidence also showed that there may be complex issues of causation in comparatively few of the hundreds of thousands of cases before the VA, but there is no adequate showing of the effect the availability of lawyers would have on the proper disposition of these cases. Neither the difference in success rate nor the existence of complexity in some cases is sufficient to warrant a conclusion that the right to retain and compensate an attorney in VA cases is a necessary element of procedural fairness under the Fifth Amendment.

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the process in connection with several proposed bills that would have provided for judicial review of BVA decisions, and also would have withdrawn the fee limitation for proceedings occurring after the first denial by the BVA, while retaining the limitation for proceedings prior to that time. The Committee Report accompanying a 1982 bill noted its belief that the claims process presently operates informally and nonadversarially, that there was no evidence that most claimants were not satisfied with the VA's resolution of their claims, that there was in general "no need" for attorneys inasmuch as applying for benefits was a "relatively uncomplicated procedure," and that the service organizations afforded a "high quality of representation." S. Rep. No. 97–466, pp. 25, 49–50 (1982). Each bill unanimously passed the Senate, but died in House Committee, leaving the present system in operation. See S. 349, 97th Cong., 2d Sess (1982); S. 636, 98th Cong., 1st Sess. (1983).

When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue. See *Rostker* v. *Goldberg*, 453 U. S. 57, 72–73 (1981); *Vance* v. *Bradley*, 440 U. S. 93, 111–112 (1979); *Katzenbach* v. *McClung*, 379 U. S. 294 (1964). Because we do not believe the record in the District Court contradicted these findings, however, we need not rely on them, or determine what deference must be afforded on this congressional record; we mention the Committee's findings only because they are entirely consistent with our understanding of the record developed in the District Court.

We have in previous cases, of course, held not only that the Constitution permits retention of an attorney, but also that on occasion it requires the Government to provide the services of an attorney. The Sixth Amendment affords representation by counsel in all criminal proceedings, and in cases such as *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), we have held that this provision requires a State prosecuting an indigent to afford him legal representation for his defense. No one would gainsay that criminal proceedings are adversarial in nature, and of course the Sixth Amendment applies only to such proceedings.

In cases such as *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), we observed that counsel can aid in identifying legal questions and presenting arguments, and that one charged with probation violation may have a right to counsel because of the liberty interest involved. We have also concluded after weighing the *Mathews* factors that the right to appointed counsel in a case involving the threatened termination of parental rights depends upon the circumstances of each particular case, see *Lassiter* v. *Department of Social Services of Durham County*, 452 U. S. 18 (1981), while three of the dissenters thought the same balancing required appointment of counsel in all such cases. *Id.*, at 35 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting).

But where, as here, the only interest protected by the Due Process Clause is a property interest in the continued receipt of Government benefits, which interest is conferred and terminated in a nonadversary proceeding, these precedents are of only tangential relevance. Appellees rely on *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), in which the Court held that a welfare recipient subject to possible termination of benefits was entitled to be represented by an attorney. The Court said that "counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the

recipient." *Id.*, at 270–271. But in defining the process required the Court also observed that "the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. . . . His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." *Id.*, at 264 (emphasis in original).

We think that the benefits at stake in VA proceedings, which are not granted on the basis of need, are more akin to the Social Security benefits involved in *Mathews* than they are to the welfare payments upon which the recipients in *Goldberg* depended for their daily subsistence. Just as this factor was dispositive in *Mathews* in the Court's determination that no evidentiary hearing was required prior to a temporary deprivation of benefits, 424 U. S., at 342–343, so we think it is here determinative of the right to employ counsel. Indeed, there appears to have been no stated policy on the part of New York in *Goldberg* against permitting an applicant to divide up his welfare check with an attorney who had represented him in the proceeding; the procedures there simply prohibited personal appearance of the recipient with or without counsel and regardless of whether counsel was compensated, and in reaching its conclusion the Court relied on agency regulations allowing recipients to be represented by counsel under some circumstances. 424 U. S., at 342–343.

This case is further distinguishable from our prior decisions because the process here is not designed to operate adversarially. While counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding, where as here no such adversary appears, and in addition a claimant or recipient is provided with substitute safeguards such as a competent representative, a decisionmaker whose duty it is to aid the claimant, and significant concessions with respect to the claimant's burden of proof,

the need for counsel is considerably diminished. We have expressed similar concerns in other cases holding that counsel is not required in various proceedings that do not approximate trials, but instead are more informal and nonadversary. See *Parham* v. *J. R.*, 442 U. S., at 608–609; *Goss* v. *Lopez*, 419 U. S. 565, 583 (1975); *Wolff* v. *McDonnell*, 418 U. S., at 570.

Thus none of our cases dealing with constitutionally required representation by counsel requires the conclusion reached by the District Court. Especially in light of the Government interests at stake, the evidence adduced before the District Court as to success rates in claims handled with or without lawyers shows no such great disparity as to warrant the inference that the congressional fee limitation under consideration here violates the Due Process Clause of the Fifth Amendment. What evidence we have been pointed to in the record regarding complex cases falls far short of the kind which would warrant upsetting Congress' judgment that this is the manner in which it wishes claims for veterans' benefits adjudicated. *Schweiker* v. *McClure*, 456 U. S. 188, 200 (1982); *Mathews*, 424 U. S., at 344, 349. The District Court abused its discretion in holding otherwise.

IV

Finally, we must address appellees' suggestion that the fee limitation violates their First Amendment rights. Appellees claim that cases such as *Mine Workers* v. *Illinois State Bar Assn.*, 389 U. S. 217 (1967), and *Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964), establish for individuals and organizations a right to ensure "meaningful access to courts" for themselves or their members, and that the District Court was correct in holding that this right was violated by the fee limitation. There are numerous conceptual difficulties with extending the cited cases to cover the situation here; for example, those cases involved the rights of unions and union members to retain or recommend counsel

for proceedings where counsel were allowed to appear, and the First Amendment interest at stake was primarily the right to associate collectively for the common good. In contrast, here the asserted First Amendment interest is primarily the individual interest in best prosecuting a claim, and the limitation challenged applies across-the-board to individuals and organizations alike.

But passing those problems, appellees' First Amendment arguments, at base, are really inseparable from their due process claims. The thrust is that they have been denied "meaningful access to the courts" to present their claims. This must be based in some notion that VA claimants, who presently are allowed to speak in court, and to have someone speak for them, also have a First Amendment right to pay their surrogate speaker;[13] beyond that questionable proposition, however, even as framed appellees' argument recognizes that such a First Amendment interest would attach only in the absence of a "meaningful" alternative. The foregoing analysis of appellees' due process claim focused on substantially the same question—whether the process allows a claimant to make a meaningful presentation—and we concluded that appellees had such an opportunity under the present claims process, and that significant Government interests favored the limitation on "speech" that appellees attack. Under those circumstances appellees' First Amendment claim has no independent significance. The decision of the District Court is accordingly

Reversed.

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[13] The dissent quotes from our decision in *FEC* v. *National Conservative Political Action Committee*, 470 U. S. 480, 493 (1985), *post*, at 364, n. 13, as if the analysis in that case answers the issues raised here. One would think that another proposition "so obvious that [it] seldom need[s] to be stated explicitly," *post*, at 368, n. 16, is that the constitutional analysis of a regulation that restricts core political speech, such as the regulation at issue in *FEC*, will differ from the constitutional analysis of a restriction on the available resources of a claimant in Government benefit proceedings.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, concurring.

I join the Court's opinion and its judgment because I agree that this Court has appellate jurisdiction under 28 U. S. C. § 1252 and that the District Court abused its discretion in issuing a nationwide preliminary injunction against enforcement of the $10 fee limitation in 38 U. S. C. § 3404(c). I also agree that the record before us is insufficient to evaluate the claims of any individuals or identifiable groups. I write separately to note that such claims remain open on remand.

The grant of appellate jurisdiction under § 1252 does not give the Court license to depart from established standards of appellate review. This Court, like other appellate courts, has always applied the "abuse of discretion" standard on review of a preliminary injunction. See, *e. g.*, *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931–932 (1975). As the Court explains, direct appeal of a preliminary injunction under § 1252 is appropriate in the rare case such as this where a district court has issued a nationwide injunction that in practical effect invalidates a federal law. In such circumstances, § 1252 "assure[s] an expeditious means of affirming or removing the restraint on the Federal Government's administration of the law . . . ." *Heckler* v. *Edwards*, 465 U. S. 870, 882 (1984). See also *id.*, at 881, nn. 15 and 16 (§ 1252 is closely tied to the need to speedily resolve injunctions preventing the effectuation of Acts of Congress). Contrary to the suggestion of JUSTICE BRENNAN, *post*, at 355, the Court fully effectuates the purpose of § 1252 by vacating the preliminary injunction which the District Court improperly issued. Since the District Court did not reach the merits, any cloud on the constitutionality of the $10 fee limitation that remains after today's decision is no greater than exists prior to judgment on the merits in any proceeding questioning a statute's constitutionality.

A preliminary injunction is only appropriate where there is a demonstrated likelihood of success on the merits. *Doran*

v. *Salem Inn, Inc., supra.* In order to justify the sort of categorical relief the District Court afforded here, the fee limitation must pose a risk of erroneous deprivation of rights in the generality of cases reached by the injunctive relief. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 344 (1976). Given the nature of the typical claim and the simplified Veterans' Administration procedures, the record falls short of establishing any likelihood of such sweeping facial invalidity. *Ante*, at 329–330.

As the Court observes, the record also "is . . . short on definition or quantification of 'complex' cases" which might constitute a "group" with respect to which the process provided is "[in]sufficient for the large majority." *Ante*, at 329, 330; *Parham* v. *J. R.*, 442 U. S. 584, 617 (1979). The "determination of what process is due [may] var[y]" with regard to a group whose "situation differs" in important respects from the typical veterans' benefit claimant. *Parham* v. *J. R.*, *supra*, at 617. Appellees' claims, however, are not framed as a class action nor were the lower court's findings and relief narrowly drawn to reach some discrete class of complex cases. In its present posture, this case affords no sound basis for carving out a subclass of complex claims that by their nature require expert assistance beyond the capabilities of service representatives to assure the veterans "'[a] hearing appropriate to the nature of the case.'" *Boddie* v. *Connecticut*, 401 U. S. 371, 378 (1971), quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). *Ante*, at 329.

Nevertheless, it is my understanding that the Court, in reversing the lower court's preliminary injunction, does not determine the merits of the appellees' individual "as applied" claims. The complaint indicates that appellees challenged the fee limitation both on its face and as applied to them, and sought a ruling that they were entitled to a rehearing of claims processed without assistance of an attorney. I App. 39–42. Appellee Albert Maxwell, for example, alleges that

his service representative retired and failed to notify him that he had dropped his case. Mr. Maxwell's records indicate that he suffers from the after effects of malaria contracted in the Bataan death march as well as from multiple myelomas allegedly a result of exposure to radiation when he was a prisoner of war detailed to remove atomic debris in Japan. *Id.*, at 45–89. Maxwell contends that his claims have failed because of lack of expert assistance in developing the medical and historical facts of his case. As another example, Doris Wilson, a widow who claims her husband's cancer was contracted from exposure to atomic testing, alleges her service representative waived her right to a hearing because he was unprepared to represent her. She contends her claim failed because she was unable without assistance to obtain service records and medical information. *Id.*, at 217.

The merits of these claims are difficult to evaluate on the record of affidavits and depositions developed at the preliminary injunction stage. Though the Court concludes that denial of expert representation is not "*per se* unconstitutional," given the availability of service representatives to assist the veteran and the Veterans' Administration boards' emphasis on nonadversarial procedures, "[o]n remand, the District Court is free to and should consider any individual claims that [the procedures] did not meet the standards we have described in this opinion." *Parham* v. *J. R.*, *supra*, at 616–617.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today concludes that it has mandatory jurisdiction pursuant to 28 U. S. C. § 1252 directly to review the District Court's entry of a preliminary injunction restraining the Government from enforcing the provisions of 38 U. S. C. §§ 3404 and 3405 pending a full trial on the merits of appellees' contention that those statutes violate the First and

Fifth Amendments. *Ante*, at 316–319.[1] The Court then proceeds to sustain the constitutionality of those statutes on the ground that "the process allows a claimant to make a meaningful presentation" on behalf of his claim for service-connected death and disability benefits even without the assistance of his attorney. *Ante*, at 335. The Court having reached this issue, I feel constrained to note my strong disagreement on the merits for the reasons eloquently set forth in JUSTICE STEVENS' dissent, which I join.

I write separately, however, because I believe the Court's exercise of appellate jurisdiction in this case is not authorized by § 1252. Because the District Court's interlocutory order granting a preliminary injunction did not constitute a decision striking down the challenged statutes on constitutional grounds, appellate review of the propriety and scope of the preliminary injunction instead rests initially in the Court of Appeals for the Ninth Circuit pursuant to 28 U. S. C. § 1292(a)(1), from which review in this Court could then be sought through a petition for a writ of certiorari. The Court's decision to the contrary is wholly inconsistent with the purpose and history of § 1252, well-established principles respecting interlocutory review of preliminary injunctions, and common sense.

I

The District Court did not hold that §§ 3404 and 3405 are unconstitutional either on their face or as applied. Instead, for purposes of considering the appellees' motion for a pretrial preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, it found that appellees had

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[1] Title 38 U. S. C. § 3404 prohibits a veteran or his survivors from paying more than $10 to an attorney for assistance in attempting to obtain service-connected death and disability benefits, and § 3405 provides that any attorney who receives more than $10 in these circumstances "shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both."

"demonstrated a high likelihood of prevailing" on the merits of their due process and First Amendment challenges. 589 F. Supp. 1302, 1323 (ND Cal. 1984); see also *id.*, at 1307, 1327, 1329. The court then weighed the potential for irreparable injury and the balance of hardships in light of this *likelihood* of success. It found that the appellees had "shown the irreparable injury necessary to obtain injunctive relief" and concluded that "the balance of hardship also weighs heavily in [their] favor." *Id.*, at 1329.[2] Accordingly, the court entered a broad preliminary injunction restraining enforcement of the challenged statutes "pending a trial on the merits of the above-entitled action." *Ibid.* As this Court was advised at oral argument, the appellees contemplate further extensive

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[2]The court noted that "the government has submitted absolutely no evidentiary support" for its claim of potential hardship from the entry of preliminary relief. 589 F. Supp., at 1328, n. 23. Appellees, on the other hand, had pointed to a number of alleged hardships in support of their motion: (1) "a substantial number of SCDDC Claimants who would be forced to proceed without a lawyer during the pendency of this litigation would go on to lose or abandon their claims"; (2) "the fee limitation exacts a heavy toll in terms of Claimants' ability to petition the V. A. for a redress of grievances, access to the V. A., and fundamental rights of free speech and association," it being well established that the "loss of First Amendment freedoms, even temporarily, constitutes irreparable injury"; and (3) "many veterans, and particularly those whose cancer claims arise out of radiation or Agent Orange exposure such as Maxwell, Cordray and Warehime, may die prior to trial on the merits. For these veterans, the instant motion is their *only* opportunity for redress. Indeed, one of the intended plaintiffs herein, Charles Targett, died of brain cancer before this action could even be filed." Plaintiffs' Memorandum of Points and Authorities in Support of Application for a Preliminary Injunction, No. C–83–1861–MHP, pp. 17–19 (ND Cal. Nov. 14, 1983) (emphasis added) (Preliminary Injunction Memorandum). See also Exhibit E, Declaration of Gordon P. Erspamer ¶3, attached to Preliminary Injunction Memorandum ("Based upon my knowledge of the medical conditions of Messrs. Maxwell, Cordray and Warehime, and my acquaintance with their medical records, I believe, regrettably, there is a substantial possibility that one or more of them will not survive through trial").

discovery and a full trial on the underlying First and Fifth Amendment issues. Tr. of Oral Arg. 31–32.[3]

Contrary to the Court's assertion, there is much more than a "semantic difference" between a finding of likelihood of success sufficient to support preliminary relief and a final holding on the merits. *Ante*, at 317. Until today, the Court always has recognized that district court findings on "likelihood of success on the merits" are *not* "tantamount to decisions on the underlying merits"; the two are "significantly different." *University of Texas* v. *Camenisch*, 451 U. S. 390, 393–394 (1981). Preliminary injunctions are granted on the basis of a broad "balance of factors" determined through "procedures that are less formal and evidence that is less complete than in a trial on the merits," and the parties are accorded neither "a full opportunity to present their cases nor . . . a final judicial decision based on the *actual* merits of a controversy." *Id.*, at 395–396 (emphasis added). District court orders granting preliminary injunctions may therefore be reviewed only on an abuse-of-discretion standard: an appellate court may conclude that the district court's preliminary relief sweeps too broadly, or is based on an improper balancing of hardships, or even that the likelihood of success has been overdrawn. See generally *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931–932 (1975); *Brown* v. *Chote*, 411 U. S. 452, 457 (1973). But under the abuse-of-discretion standard, appellate courts obviously may "intimate no view as to the ultimate merits" of the underlying controversy. *Doran* v. *Salem Inn, Inc.*, *supra*, at 934; *Brown* v. *Chote*, *supra*, at 457.[4] For several reasons, this is particularly true

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[3] As the District Court observed, "[a]t oral argument [before that court] attorneys for both plaintiffs and defendants agreed that this was a motion solely for preliminary injunctive relief and not for permanent injunctive relief." 589 F. Supp., at 1307, n. 5.

[4] See generally *United States* v. *Corrick*, 298 U. S. 435 (1936); *Alabama* v. *United States*, 279 U. S. 229 (1929); *United Fuel Gas Co.* v. *Public Serv-*

where "grave, far-reaching constitutional questions" are presented: the records developed in preliminary-injunction cases are "simply insufficient" to allow a final decision on the merits; as a matter of fairness the litigants are entitled to a full evidentiary presentation before a final decision is reached; and where questions of constitutional law turn on disputed fact,[5] such decisions must initially be rendered by a district court factfinder. *Brown* v. *Chote*, *supra*, at 457.

Section 1252 does not empower this Court directly to police the preliminary-injunctive process in the district courts. Instead, it was enacted to ensure the "prompt determination by the court of last resort of disputed questions of the *constitutionality* of acts of the Congress."[6] Whether one relies on

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ice Comm'n of West Virginia, 278 U. S. 322 (1929); R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States §§ 196, 208, 217 (1951).

[5] As in the due process balancing inquiry conducted by the District Court in this case pursuant to *Mathews* v. *Eldridge*, 424 U. S. 319 (1976).

[6] H. R. Rep. No. 212, 75th Cong., 1st Sess., 2 (1937) (emphasis added). See also H. R. Conf. Rep. No. 1490, 75th Cong., 1st Sess. (1937); S. Rep. No. 963, 75th Cong., 1st Sess. (1937). Remarks during floor debate reinforce the conclusion that § 1252 was intended to provide mandatory Supreme Court review only where the underlying constitutional issue was properly presented for dispositive resolution. See, *e. g.*, 81 Cong. Rec. 3254 (1937) (remarks of Rep. Sumners) (provision would enable an appeal "directly to the Supreme Court from an adverse decision on the question of constitutionality"); *id.*, at 3256 (remarks of Rep. Brewster) (provision designed to "obviate delays in our courts so far as determination of constitutional questions is concerned"); *id.*, at 3260–3261 (remarks of Rep. Sumners) (case "would come up on the question of constitutionality"; "[w]hen the question of the constitutionality of an act of Congress is raised, and it is a serious question, it is the judgment of the members of the committee that that question ought to be presented to the Supreme Court just as quickly as it can be carried there properly"); *id.*, at 3267 (remarks of Rep. McFarlane) (provision would "expedite the testing of the constitutionality of acts of Congress"); *id.*, at 3272 (remarks of Rep. Sumners) ("where . . . the decision is adverse to the constitutionality of the act in question, the Government, in such event, may appeal directly to the Supreme Court in order to expedite the determination of the constitutional question"). See also Frankfurter & Fisher, The Business of the Supreme Court at the

the codified language—permitting a direct appeal from a lower-court decision "*holding* an Act of Congress unconstitutional"[7]—or on the original language of the statute—permitting a direct appeal where "the decision is *against* the constitutionality of any Act of Congress"[8]—it is obvious that

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October Terms, 1935 and 1936, 51 Harv. L. Rev. 577, 614, 616–617 (1938) (the "essence" of the legislation now codified as § 1252 was to ensure "a speedy test" of the constitutionality of a federal statute by promptly "securing the final word from the Supreme Court").

[7] Title 28 U. S. C. § 1252 provides in full:

"Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

"A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court."

[8] The Judiciary Act of 1937, § 2, 50 Stat. 752, provided in full:

"In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor or notice thereof within thirty days after the entry of a final or interlocutory judgment, decree, or order; and in the event that any such appeal is taken, any appeal or cross-appeal by any party to the suit or proceeding taken previously, or taken within sixty days after notice of an appeal under this section, shall also be or be treated as taken directly to the Supreme Court of the United States. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a

§ 1252 contemplates a fully consummated lower-court decision of unconstitutionality so that this Court may carry out the statutory purpose of rendering a prompt and dispositive determination respecting the constitutionality of the challenged legislation. Jurisdiction pursuant to § 1252 accordingly is proper *only* where "the basis of the decision below *in fact* was that the Act of Congress was unconstitutional," *United States* v. *Raines*, 362 U. S. 17, 20 (1960) (emphasis added)[9]—and "likelihood" simply does not equate with "in fact." Where a district court merely has concluded that there is a "likelihood" of unconstitutionality sufficient to support temporary relief, § 1252's underlying purpose cannot be fulfilled because this Court (if faithful to precedent) cannot resolve the "ultimate merits" of the underlying constitutional issue. *Doran* v. *Salem Inn, Inc.*, 422 U. S., at 934; *Brown* v. *Chote*, 411 U. S., at 457. Instead, all the Court could do would be to consider whether the nature or scope of preliminary relief constituted abuses of discretion, and perhaps to disagree with the district court respecting the "likelihood" that the appellees ultimately would prevail. In my opinion, these questions relating to the supervision of the injunctive process are not subsumed in § 1252 and properly are left in the first instance to the courts of appeals.

The Court argues, however, that because § 1252 explicitly grants jurisdiction to this Court "from an *interlocutory* or final judgment" of unconstitutionality, Congress surely intended to include preliminary injunctions granted on "likelihood of success" within the scope of § 1252. *Ante*, at 316–317, 318–319. The Court reinforces this argument by noting

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like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law."

[9] See also *Heckler* v. *Edwards*, 465 U. S. 870, 877 (1984); *McLucas* v. *DeChamplain*, 421 U. S. 21, 30–31 (1975); *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U. S. 561, 563–566 (1972) *(per curiam)*; *Fleming* v. *Rhodes*, 331 U. S. 100, 103–104 (1947); *Garment Workers* v. *Donnelly Garment Co.*, 304 U. S. 243, 249 (1938).

that *all* interlocutory decisions, even if cast in dispositive terms, "are subject to revision" before entry of final judgment. *Ante*, at 317. This argument is wholly unpersuasive. As demonstrated by the large body of precedent applying 28 U. S. C. §§ 1291 and 1292(a), there is a substantial difference between interlocutory decisions that are "tentative, informal or incomplete"[10] and those that for all practical purposes "conclusively determine the disputed question."[11] Interlocutory decisions falling within the latter category may, in a small set of circumstances, be immediately appealed because they represent "fully consummated decisions" on the matter in question that are capable of being reviewed and dispositively affirmed or reversed.[12] The "bare fact"[13] that every order short of a final decree is theoretically "subject to reopening at the discretion of the district judge" is insufficient to preclude review in these circumstances.[14] Instead, interlocutory appeals to the courts of appeals pursuant to §§ 1291 and 1292(a) are proper when no further consideration of the disputed issue is contemplated by the district court and when, as a practical matter, there is "no basis to suppose" that the resolution is anything less than definite.[15]

Where the disputed decision "remains open, unfinished or inconclusive," on the other hand, it is well established that under §§ 1291 and 1292(a) "there may be no intrusion by appeal" of the unresolved issue.[16] The reasons are manifest. If the appellate court addressed the issue in such an inconclu-

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[10] *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949).

[11] *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978).

[12] *Abney* v. *United States*, 431 U. S. 651, 659 (1977).

[13] 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3911, p. 470 (1976) (Wright, Miller, & Cooper).

[14] *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 12 (1983).

[15] *Id.*, at 13. See generally *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 375 (1981); *United States* v. *MacDonald*, 435 U. S. 850, 854–855 (1978); *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 172 (1974).

[16] *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S., at 546.

sive posture, it either would render an advisory opinion that had no binding effect or, if binding effect were intended, would usurp the authority of the district court to pass on the issue in the first instance. "Appeal gives the upper court a power of review, not one of intervention."[17]

This elementary distinction applies with direct force to appeals pursuant to § 1252.[18] Where a district court issues an interlocutory order based on a fully consummated determination that a federal statute is unconstitutional, an appeal is proper because the constitutional question can authoritatively be decided with dispatch. Thus in *Fleming* v. *Rhodes*, 331 U. S. 100, 102 (1947), the District Court had denied preliminary relief enjoining the eviction of tenants on the ground that the federal statute prohibiting the evictions was unconstitutional. And in *McLucas* v. *DeChamplain*, 421 U. S. 21, 26–27 (1975), the District Court for the District of Columbia had preliminarily enjoined the enforcement of a statute in reliance on a decision by the Court of Appeals for the District of Columbia Circuit that the statute was unconstitutional—"a decision," we noted, that was "binding on the District Court," *id.*, at 28. In neither case was there any basis to believe that the interlocutory holding of unconstitutionality was anything but final.

On the other hand, we have *never* in the 48-year history of § 1252 assumed jurisdiction where the district court had done no more than simply determine that there was a "likelihood" of unconstitutionality sufficient to support temporary relief pending a final decision on the merits. Because such deter-

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[17] *Ibid.* See also *Stack* v. *Boyle*, 342 U. S. 1, 12 (1951) (opinion of Jackson, J.) ("[I]t is a final *decision* that Congress has made reviewable. . . . While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment") (emphasis in original).

[18] Similar distinctions have evolved concerning the scope of our jurisdiction over "final" state-court judgments or decrees pursuant to 28 U. S. C. § 1257. See, *e. g.*, *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 476–487 (1975); *Construction Laborers* v. *Curry*, 371 U. S. 542, 548–551 (1963).

minations are inherently "open, unfinished [and] inconclusive,"[19] the only proper questions for immediate appellate consideration would be whether the entry and scope of preliminary relief were abuses of discretion. But such review is not the purpose of § 1252 because, as the Court today concedes, "it was the *constitutional* question that Congress wished this Court to decide." *Ante*, at 318 (emphasis added).[20] If the Court did address the constitutional issue in these circumstances, it either would be rendering an advisory opinion subject to revision once the district court reached the merits or, to the extent it purported to pass on the issue with finality, would be exercising a forbidden "power . . . of intervention" rather than of review.[21] We have long recognized that such intervention is barred under §§ 1291 and 1292(a), and should have so recognized here as well.[22]

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[19] *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, at 546.

[20] "When Congress created the exceptional right to bypass the court of appeals, it directly linked that right to a lower court's invalidation of an Act of Congress. Although it is in the nature of cases and controversies that the court's judgment may address not only the issue of statutory constitutionality, but other issues as well, such as attorney's fees, *remedy*, or related state-law claims, the natural sense of the jurisdictional provision is that *the holding of statutory unconstitutionality, not these other issues, is what Congress wished this Court to review in the first instance.*

"Because direct review is linked to a court's holding a federal statute unconstitutional, the logical test of which appeals from a judgment must be brought directly to this Court and which, standing alone, must follow the normal route of appellate review, *is whether the issue on appeal is the holding of statutory unconstitutionality.*" *Heckler* v. *Edwards*, 465 U. S., at 880 (emphasis added).

[21] *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, at 546.

[22] The Court argues that the finality issue is a "bit of a red herring" given that the original version of § 1252, see n. 8, *supra*, provided jurisdiction over decisions "against the constitutionality of any Act of Congress," and that "[a]ny fair reading of the decision at issue would conclude that it is 'against the constitutionality'" of the challenged statutes. *Ante*, at 318. I disagree. *Every* district court order in litigation such as this that denies a motion to dismiss or for summary judgment, grants a temporary restraining order, see n. 26, *infra*, or even allows discovery to proceed based on the substantiality of the plaintiff's claim could be characterized as being

The Court contends, however, that the District Court in this case enjoined the challenged statute "across the country and under all circumstances," and that immediate *mandatory* appeal to this Court therefore "is in accord with the purpose of the statutory grant"—provision of "an expeditious means for ensuring certainty and uniformity in the enforcement of such an Act." *Ante*, at 318–319. See also *ante*, at 336–337 (O'CONNOR, J., concurring). Congress unquestionably intended by § 1252 to provide an "expeditious" means for resolving constitutional questions,[23] but an appeal is proper only when it is those questions themselves that have been decided—a condition not met in preliminary-injunction cases where, as here, we may "intimate no view as to the ultimate merits" of the underlying controversy. *Doran* v. *Salem Inn, Inc.*, 422 U. S., at 934.

Moreover, the Court's reasoning sweeps both too narrowly and too broadly. It sweeps too narrowly because mandatory jurisdiction pursuant to § 1252 is not confined to district court decisions striking down statutes "across the country and under all circumstances." *Ante*, at 319. See also *ante*, at 336 (O'CONNOR, J., concurring). We have instead long recognized that § 1252 requires that we review decisions that simply invalidate challenged statutes even as applied only to particular individuals in particular circumstances.[24] Allow-

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"against" the validity of a statute in the sense that it is not squarely "for" the statute, else the litigation would be terminated. Preliminary injunctions based on "likelihood" of success do, to be sure, represent a more definite degree of doubt respecting the statute than, say, an order denying summary judgment based on "genuine issues" remaining. Cf. Fed. Rule Civ. Proc. 56(c). But these are differences of degree and not of kind. A decision cannot squarely be "against" the constitutionality of a statute if the constitutional question is still "open, unfinished [and] inconclusive." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S., at 546.

[23] See legislative history discussed in n. 6, *supra*.

[24] See, *e. g.*, *EEOC* v. *Wyoming*, 460 U. S. 226, 229 (1983); *California* v. *Grace Brethren Church*, 457 U. S. 393, 404–407 (1982); *United States* v. *Lee*, 455 U. S. 252, 256 (1982); *United States* v. *Darusmont*, 449 U. S. 292, 293 (1981) *(per curiam)*.

ing an immediate appeal in these circumstances is thought to further the "great public interest" in securing "prompt determinations" of the validity of lower court precedent that might have binding effect in cases beyond the one at hand.[25] Where a district court simply has granted a preliminary injunction—or for that matter a temporary restraining order[26]—barring enforcement of a statute as applied to certain individuals, the precedential effect is far more obscure. Such orders are based on a case-specific balancing of the equities that may well not carry over into other situations. It is simply too burdensome for this Court to bear *mandatory* direct jurisdiction over every preliminary injunction, temporary restraining order, and other pretrial order in cases potentially implicating the constitutionality of federal statutes. The Court might respond that § 1252 appeals in this context can be limited to preliminary relief having nationwide impact, but this would be bootstrap reasoning without support in our precedents: the propriety of an appeal under § 1252 turns not on the *scope* of the potential impact, but on the underlying *nature* of the district court's determination.[27]

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[25] *Fleming* v. *Rhodes*, 331 U. S., at 104.

[26] Temporary restraining orders generally cannot be granted absent a showing of reasonable probability of eventual success on the merits although, as in preliminary-injunction cases, the degree of required probability may vary depending on the extent of irreparable injury and the balance of hardships. See 11 Wright, Miller, & Cooper § 2951, at 507–510. The Court's reasoning therefore extends without apparent limitation to all temporary restraining orders issued in litigation challenging the constitutionality of federal statutes.

[27] "Congress did not enact an open-ended 'impact' test for determining which cases should come to this Court for direct review. Although remedial aspects of a case are important, the touchstone of direct appeal under § 1252 is not a party's or our own judgment of the significance of a decision. We exercise that judgment under our discretion to grant certiorari in any civil or criminal case before, as well as after, rendition of judgment. 28 U. S. C. § 1254(1); this Court's Rule 18. In § 1252, Congress mandated direct review not simply for decisions with impact, but rather for decisions

The Court's reasoning sweeps too broadly because there are means other than an expansive reading of § 1252 to ensure that improvident district court injunctions based on "likelihood of success" do not impede the effective functioning of the Federal Government. As Congress has emphasized, "[s]wift judicial review can be had in cases where the public interest requires it" through means short of mandatory appeals jurisdiction.[28] Pursuant to 28 U. S. C. § 1292(a), for example, the courts of appeals may promptly review district court orders granting or denying preliminary injunctions. Courts of appeals routinely supervise the trial-court injunctive process and are therefore in a far superior position to pass initially on questions of irreparable injury, balance of hardships, and abuse of discretion.[29] Moreover, if the question whether a district court abused its discretion in issuing preliminary relief "is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court," this Court's Rule 18, certiorari review can be obtained before the court of appeals renders judgment. See 28 U. S. C. § 2101(e). This Court has not hesitated to exercise this power of swift intervention in cases of extraordinary constitutional moment and

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whose impact was predicated upon" a lower-court holding that an Act of Congress is unconstitutional. *Heckler* v. *Edwards*, 465 U. S., at 884.

There is an additional reason why today's jurisdictional decision will bring every order granting preliminary relief in single as-applied cases directly before the Court: jurisdictional rules must be clear cut and cannot turn on indefinite notions of "importance" or "wide-ranging impact." "[L]itigants ought to be able to apply a clear test to determine whether, as an exception to the general rule of appellate review, they must perfect an appeal directly to the Supreme Court." *Id.*, at 877.

[28] S. Rep. No. 94–204, p. 11 (1975). This Report pertained to Congress' repeal of the three-judge district court provisions of 28 U. S. C. § 2282 (1970 ed.), discussed *infra*, at 351–354, and nn. 32–35.

[29] See generally 7 J. Moore, J. Lucas, & K. Sinclair, Moore's Federal Practice, ch. 65 (1985); 11 Wright, Miller, & Cooper §§ 2947–2950.

in cases demanding prompt resolution for other reasons.[30] Under this procedure, the Court has discretion to limit immediate review to exceptional cases and to leave initial review of most matters in the courts of appeals—which of course "recognize the vital importance of the time element" in constitutional challenges involving the granting or denial of interlocutory relief.[31] Under today's construction of § 1252, however, the Court has no such discretion and accordingly has, I respectfully submit, expanded its mandatory docket to matters that we have no business resolving in the first instance.

One final consideration, based on the history of § 1252 and related provisions, sheds further light on the fallacy of the Court's jurisdictional reasoning. Section 1252 originally was enacted as § 2 of the Judiciary Act of 1937, 50 Stat. 752. Section 3 of that Act created the since-repealed three-judge district court provisions of 28 U. S. C. § 2282 (1970 ed.). Section 3 provided that "[n]o interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress" in cases challenging the constitutionality of the Act could be granted unless presented to and resolved by a three-judge district court. That section also contained its own built-in jurisdictional authorization for direct Supreme Court review of any "order, decree, or judgment" issued by

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[30] See, *e. g.*, *United States* v. *Nixon*, 418 U. S. 683, 686–687 (1974) (certiorari granted before judgment by the Court of Appeals "because of the public importance of the issues presented and the need for their prompt resolution"); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952); *United States* v. *Mine Workers*, 330 U. S. 258 (1947); *Ex parte Quirin*, 317 U. S. 1 (1942); *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935); *United States* v. *Bankers Trust Co.*, decided together with *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935).

[31] *Aaron* v. *Cooper*, 357 U. S. 566, 567 (1958); see also *Cooper* v. *Aaron*, 358 U. S. 1, 13 (1958).

such a court granting or denying "an interlocutory or permanent injunction in such case." Moreover, § 3 provided that a single district judge could enter a "temporary stay or suspension, in whole or in part," of the enforcement of the challenged statute "until decision upon the application," provided that the applicant made a sufficient showing of, *inter alia*, "irreparable loss or damage."[32]

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[32] Section 3 provided in full:

"No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as a district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in hearing and determining such application. It shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to designate immediately two other judges from such circuit for such purpose, and it shall be the duty of the judges so designated to participate in such hearing and determination. Such application shall not be heard or determined before at least five days' notice of the hearing has been given to the Attorney General and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the petitioner unless a temporary restraining order is granted, the judge to whom the application is made may grant such temporary restraining order at any time before the hearing and determination of the application, but such temporary restraining order shall remain in force only until such hearing and determination upon notice as aforesaid, and such temporary restraining order shall contain a specific finding, based upon evidence submitted to the court making the order and identified by reference thereto, that such irreparable loss or damage would result to the petitioner and specifying the nature of the loss or damage. The said court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension, in whole or in part, until decision upon the application. The hearing upon any such application for an interlocutory or permanent injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earli-

The history of § 3 is relevant to the instant question in two respects. First, this Court has held flatly that temporary relief granted by a single district judge pending the convening of a three-judge court is reviewable in the first instance by the courts of appeals and not on direct appeal to this Court. See, *e. g.*, *Hicks* v. *Pleasure House, Inc.*, 404 U. S. 1, 3 (1971) *(per curiam)* (preliminary relief "issued pursuant to [28 U. S. C.] § 2284(3) is reviewable in a court of appeals to the extent that any such order is reviewable under 28 U. S. C. §§ 1291 and 1292(a)").[33] It would have made no sense to channel appeals of such orders under § 3 to the courts of appeals while channeling appeals of *identical* preliminary orders in cases that might ultimately fall within § 2 to this Court in the first instance.

Second, when Congress repealed § 2282 in 1976[34] it specifically considered the question of the best means for policing the injunctive process in constitutional challenges pending decision on the underlying merits. Whereas review of three-judge interlocutory orders in such cases formerly had been routed directly to this Court, see §§ 2282, 2283 (1970 ed.), Congress believed that interlocutory review in the courts of

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est practicable day. An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law."

[33] Title 28 U. S. C. § 2284(3) derives in part from the portions of § 3 discussed above in text, and provides that a district judge may grant a temporary restraining order pending hearing and disposition of the underlying merits by a three-judge district court.

[34] See Pub. L. 94–381, § 2, 90 Stat. 1119.

appeals pursuant to §§ 1291 and 1292(a) would be most consistent with sound judicial administration.

> "One other concern of the committee was the review of the granting, or the denial, of a stay of an injunction by a district court. The committee believes that with appeals of these cases clearly vested in the 11 Circuit Courts of Appeal, they will be more able than the Supreme Court to carefully consider and evaluate requests for a stay in these cases and that ample procedures exist to act effectively in these cases. See, 3 *Barron and Holtzoff* (Wright ed.) §§ 1371–78." S. Rep. No. 94–204, p. 11 (1975).[35]

Congress thereby indicated its firm intention to leave monitoring of the equitable injunctive process to the courts of appeals in the first instance, and to reserve mandatory direct Supreme Court review for those cases in which this Court properly could resolve the underlying merits of the constitutional challenges themselves.[36]

II

Although deciding that a direct appeal of this preliminary injunction is proper, the six Members of today's majority appear to be sharply divided over the nature of the issues before us and the proper scope of our authority on review. JUSTICE O'CONNOR, joined by JUSTICE BLACKMUN, eschews any attempt to resolve the underlying merits of the constitutional challenge. She properly recognizes that, because

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[35] The reference is to 3 W. Barron & A. Holtzoff, Federal Practice and Procedure §§ 1371–1378 (1958), which discusses, *inter alia*, the standards for staying district court orders pending appeals.

[36] Because Congress repealed the three-judge district court requirement for cases such as this and "clearly vested" review of interlocutory matters in such cases in the courts of appeals, S. Rep. No. 94–204, p. 11 (1975), the Court's reliance on precedent respecting appeals of three-judge interlocutory orders obviously is misplaced. See *ante*, at 319, citing *Goldstein* v. *Cox*, 396 U. S. 471, 476 (1970).

"[t]he merits of these claims are difficult to evaluate on the record of affidavits and depositions developed at the preliminary injunction stage," it would be improper to express any views on the merits of the appellees' as-applied challenges. *Ante*, at 338 (concurring opinion). Nor, properly, does JUSTICE O'CONNOR purport to determine the facial validity of the challenged statutes, given that the District Court has never reached a fully consummated determination on that question. Instead, she simply observes that "the record falls short of establishing any *likelihood* of such sweeping facial invalidity." *Ante*, at 337 (emphasis added). JUSTICE O'CONNOR accordingly limits her analysis to application of the abuse-of-discretion standard that governs review of preliminary-injunction orders, concluding that "the District Court abused its discretion in issuing a nationwide preliminary injunction." *Ante*, at 336. Although I find this approach far preferable to that taken by the opinion for the Court, I respectfully submit that it is inconsistent with § 1252 for two reasons: First, as set forth above, application of the abuse-of-discretion standard to the equitable process of granting preliminary relief is not subsumed in § 1252 and properly is left to the courts of appeals in the first instance. Second, this approach, by properly avoiding the ultimate resolution of the facial and as-applied constitutional challenges, has not in the slightest way furthered the underlying purpose of § 1252—ensuring the prompt and dispositive resolution of the merits of facial and as-applied constitutional challenges to federal statutes.[37]

The opinion for the Court appears to take a very different tack. To be sure, the Court notes two or three times that the District Court simply found a "likelihood" that the appel-

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[37] If I read the various opinions in this case correctly, it appears that a majority of the Court—JUSTICES O'CONNOR and BLACKMUN in their concurring opinion, and the three Justices in dissent—has *not* determined that 38 U. S. C. §§ 3404 and 3405 are constitutional either facially or as applied to particular categories of claims.

lees after a full trial would be able to demonstrate the unconstitutionality of the challenged statutes, and it states once in passing that the District Court "abused its discretion" in so finding. *Ante*, at 312–313, 315, 334. But that is not the essence of the Court's approach. The Court repeatedly seeks to cast doubt on the bona fides of the District Court's entry of preliminary relief pursuant to Rule 65 by describing that relief in quotation marks: the District Court did not really grant a preliminary injunction, but a "preliminary injunction." *Ante*, at 308, 312, 316. Having thus suggested that the matter is one of "semantic[s]" making "little difference," *ante*, at 317, the Court proceeds to assert, repeatedly, that the District Court actually "*held* that [the $10] limit violates the Due Process Clause of the Fifth Amendment, and the First Amendment," *ante*, at 307 (emphasis added).[38] Having thus mischaracterized the District Court's decision, the Court then purports "to decide this case on the merits," *ante*, at 312, n. 5—bootstrapping its way past the rule that we may "intimate no view as to the ultimate merits" in preliminary-injunction cases[39] by observing that, under § 1252, "it was the *constitutional question* that Congress wished this Court to decide," *ante*, at 318 (emphasis added).

Having thus paved the way for its consideration of the constitutional merits, the Court then proceeds to "review" the District Court's "holding" in light of the record evidence and the three-part *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), balancing test. The Court focuses on the *Mathews* factors of the risk of an erroneous decision through the current procedures and the probable value of additional safeguards. The Court rummages through the partially developed record and seizes upon scattered evidence introduced by the Government on the eve of the preliminary-injunction hearing—evidence that never has been tested in a trial on the merits—and pronounces that evidence "reliable" and compelling. See,

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[38] See also *ante*, at 312–313, 326, 334.

[39] *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 934 (1975).

e. g., *ante*, at 331.[40] Moreover, the Court excoriates the appellees and the District Court repeatedly for failing to muster sufficient evidence to support the "holding" of unconstitutionality: the appellees made "no such" sufficient presentation of evidence, introduced "nothing" to support the "holding," and "failed to make the very difficult factual showing" necessary to support the "holding" of unconstitutionality. *Ante*, at 326, 329, 330.[41] The conclusion is preordained: the statutes give the appellees "an opportunity under the present claims process" to "make a meaningful presentation" without an attorney's assistance, and the District Court's "holding" of unconstitutionality must therefore be reversed. *Ante*, at 335.

This brand of constitutional adjudication is extraordinary. Whereas JUSTICE O'CONNOR faithfully adheres to the limited role of appellate judges in reviewing preliminary injunctions and thereby departs from the purposes of § 1252, the opinion for the Court seizes upon the underlying purposes of § 1252 in order to evade the well-established rule prohibiting appellate courts from even purporting to "intimate . . . view[s]" on the ultimate merits when reviewing preliminary injunctions granted on likelihood of success. *Doran* v. *Salem Inn, Inc.*, 422 U. S., at 934. If the opinion for the Court turns out to be more than an unfortunate aberration, it will threaten a fundamental transformation of the equitable process of granting preliminary relief in cases challenging the constitutionality of Government action.[42] Individual litigants seeking such

[40] See also *ante*, at 327–330, 330–331, n. 12.

[41] See also *ante*, at 314, and n. 6, 324, n. 11, 327–334.

[42] The Court's jurisdictional reasoning would also appear to implicate the process of reviewing federal-court preliminary relief in cases challenging the constitutionality of state statutes and state-court preliminary relief in cases challenging the constitutionality of federal statutes. See 28 U. S. C. § 1254(2) (granting mandatory appeals jurisdiction to this Court where "a State statute [is] held by a court of appeals to be invalid as repugnant to the Constitution, treaties, or laws of the United States"); § 1257(1) (granting mandatory appeals jurisdiction over final state-court judgments and decrees where "the decision is against [the] validity" of a federal treaty or statute).

relief on grounds of irreparable injury and a balancing of hardships will essentially be required to confront the Government with both hands tied behind their backs: if they successfully obtain such relief, this Court will immediately intervene pursuant to § 1252 to review the "holding" of unconstitutionality, will make *de novo* findings that selected evidence is "reliable," will castigate the individuals for failing to adduce sufficient evidence to support the "merits" of the "holding," and will issue a ringing proclamation that the challenged statute is constitutional.

III

I believe that § 1252 should have been construed to permit a direct appeal to this Court only from a lower court decision that represents a fully consummated determination that an Act of Congress is unconstitutional so as to permit this Court properly to resolve the constitutional question on the merits. Unlike JUSTICE O'CONNOR, I do not believe that § 1252 requires this Court directly to police the injunctive process in constitutional challenges in the first instance. Unlike the opinion for the Court, I do not believe that § 1252 may be invoked in such cases to short-circuit the process of orderly and principled constitutional adjudication. Accordingly, I believe the Court should have vacated the judgment and remanded to the District Court for the entry of a fresh decree, so that the Government could take a proper appeal of the preliminary-injunction order to the Court of Appeals for the Ninth Circuit. See, *e. g.*, *United States* v. *Christian Echoes National Ministry*, 404 U. S. 561, 566 (1972) *(per curiam)*. The Court having decided to the contrary and having reached the merits, I join JUSTICE STEVENS' dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court does not appreciate the value of individual liberty. It may well be true that in the vast majority of cases a veteran does not need to employ a lawyer, *ante*, at 329–330, and that the system of processing veterans benefit claims, by

and large, functions fairly and effectively without the participation of retained counsel. *Ante*, at 327. Everyone agrees, however, that there are at least some complicated cases in which the services of a lawyer would be useful to the veteran and, indeed, would simplify the work of the agency by helping to organize the relevant facts and to identify the controlling issues. *Ante*, at 328, 329. What is the reason for denying the veteran the right to counsel of his choice in such cases? The Court gives us two answers: First, the paternalistic interest in protecting the veteran from the consequences of his own improvidence, *ante*, at 323; and second, the bureaucratic interest in minimizing the cost of administering the benefit program. *Ante*, at 323–325. I agree that both interests are legitimate, but neither provides an adequate justification for the restraint on liberty imposed by the $10-fee limitation.

To explain my disagreement with the Court, I shall first add a few words about the history of the fee limitation, then identify the flaws in the Court's analysis, and finally explain why I believe § 3404(c) and § 3405 impose an unconstitutional restraint on individual liberty.

I

The first fee limitation—$5 per claim—was enacted in 1862.[1] That limitation was repealed two years later and

[1] Sections 6 and 7 of the Act of July 14, 1862, which authorized a grant of pensions to certain military personnel, provided as follows:

"Sec. 6. *And be it further enacted*, That the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty, and other allowance, before the Pension Office under this act, shall not exceed the following rates: For making out and causing to be duly executed a declaration by the applicant, with the necessary affidavits, and forwarding the same to the Pension Office, with the requisite correspondence, five dollars. In cases wherein additional testimony is required by the Commissioner of Pensions, for each affidavit so required and executed and forwarded (except the affidavits of surgeons, for which such agents and attorneys shall not be entitled to any fees,) one dollar and fifty cents.

"Sec. 7. *And be it further enacted*, That any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for his

replaced by the $10-fee limitation, which has survived ever since.[2] The limitation was designed to protect the veteran from extortion or improvident bargains with unscrupulous lawyers.[3] Obviously, it was believed that the number of scoundrels practicing law was large enough to justify a legislative prohibition against charging excessive fees.

At the time the $10-fee limitation was enacted, Congress presumably considered that fee reasonable. The legal work

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services under this act than is prescribed in the preceding section of this act, or who shall contract or agree to prosecute any claim for a pension, bounty, or other allowance under this act, on the condition that he shall receive a per centum upon, or any portion of the amount of such claim, or who shall wrongfully withhold from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall, for every such offence, be fined not exceeding three hundred dollars, or imprisoned at hard labor not exceeding two years, or both, according to the circumstances and aggravations of the offence." 12 Stat. 568.

[2] On July 4, 1864, Congress repealed the sixth and seventh sections of the 1862 Act, and substituted the following sections which raised the maximum fee to $10:

"Sec. 12. *And be it further enacted*, That the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty, and other allowance before the pension-office, under this act, shall not exceed the following rates: For making out and causing to be duly executed a declaration by the applicant, with the necessary affidavits, and forwarding the same to the pension-office, with the requisite correspondence, ten dollars; which sum shall be received by such agent or attorney in full for all services in obtaining such pension, and shall not be demanded or received in whole or in part until such pension shall be obtained; and the sixth and seventh sections of an act entitled 'An act to grant pensions,' approved July fourteenth, eighteen hundred and sixty-two, are hereby repealed." 13 Stat. 389.

Section 13 of the 1864 Act reenacted the criminal penalties contained in § 7 of the 1862 Act. *Ibid.* See n. 1, *supra*.

[3] See Cong. Globe, 37th Cong., 2d Sess., 2101, 3119 (1862); Cong. Globe, 41st Cong., 2d Sess., 1967, 4459 (1870). See also *Calhoun* v. *Massie*, 253 U. S. 170, 173 (1920).

involved in preparing a veteran's claim consisted of little more than filling out an appropriate form, and, in terms of the average serviceman's base pay, a $10 fee then was roughly the equivalent of a $580 fee today.[4] At its inception, therefore, the fee limitation had neither the purpose nor the effect of precluding the employment of reputable counsel by veterans. Indeed, the statute then, as now, expressly contemplated that claims for veterans benefits could be processed by "agents or attorneys."[5]

The fact that the statute was aimed at unscrupulous attorneys is confirmed by the provision for criminal penalties. Instead of just making an agreement to pay a greater fee unenforceable—as an anticipatory pledge of an interest in future pension benefits is unenforceable—the Act contains a flat prohibition against the direct or indirect collection of a greater fee, and provides that an attorney who charges more than $10 may be imprisoned for up to two years at hard labor.[6] Thus, an unscrupulous moneylender or mer-

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[4] The base pay for all military personnel averaged $231 annually in 1865. U. S. Dept. of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Part I, p. 175 (1975). By contrast, military base pay for all personnel averaged $13,400 in 1984. See U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 1985, p. 345.

[5] Today, of course, the procedures are more elaborate than they were in 1864, and the number of claims presenting complex issues of law or fact has greatly increased. It is no longer true that the attorney would seldom, if ever, be asked to do more than fill out a simple form.

[6] Recently, we noted the effect of criminal sanctions on constitutional analysis:

"The restriction involved here is not merely an effort by the Government to regulate the use of its own property, such as was involved in *United States Postal Service* v. *Greenburgh Civic Assns.*, 453 U. S. 114 (1981), or the dismissal of a speaker from Government employment, such as was involved in *Connick* v. *Myers*, 461 U. S. 138 (1983). It is a flat, across-the-board criminal sanction . . . ." *FEC* v. *National Conservative PAC*, 470 U. S. 480, 496 (1985).

chant who might try to take advantage of an improvident veteran might have difficulty collecting his bill, but the unscrupulous lawyer might go to jail.

The language in § 3405, particularly the use of the words "directly or indirectly," apparently would apply to consultations between a veteran and a lawyer concerning a claim that is ultimately allowed, as well as to an appearance before the agency itself. In today's market, the reasonable fee for even the briefest conference would surely exceed $10. Thus, the law that was enacted in 1864 to protect veterans from unscrupulous lawyers—those who charge excessive fees—effectively denies today's veteran access to *all* lawyers who charge reasonable fees for their services.[7]

II

The Court's opinion blends its discussion of the paternalistic interest in protecting veterans from unscrupulous lawyers and the bureaucratic interest in minimizing the cost of administration in a way that implies that each interest reinforces the other. Actually the two interests are quite different and merit separate analysis.

In my opinion, the bureaucratic interest in minimizing the cost of administration is nothing but a red herring.[8] Congress has not prohibited lawyers from participating in the processing of claims for benefits and there is no reason why it

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[7] In its Report on S. 349 in the 97th Congress, the Veterans' Administration stated:

"It is probably true that, except for those whose low income qualifies them for free legal services, the current fee limitation effectively precludes attorney representation before the VA." S. Rep. No. 97–466, p. 102 (1982) (letter of Veterans' Administration's Acting Director to Hon. Alan K. Simpson, dated July 14, 1981).

[8] Section 401 of a bill approved unanimously by the Senate Committee on Veterans' Affairs would have removed the $10-fee limitation for services rendered in representing a claimant following an initial decision of the Board of Veterans' Appeals. The Committee Report stated: "Enactment of the provisions in Section 401 are estimated to entail no cost." *Id.*, at 79.

should.[9] The complexity of the agency procedures can be regulated by limiting the number of hearings, the time for argument, the length of written submissions, and in other ways, but there is no reason to believe that the *agency's* cost of administration will be increased because a claimant is represented by counsel instead of appearing *pro se*.[10] The informality that the Court emphasizes is desirable because it no doubt enables many veterans, or their lay representatives, to handle their claims without the assistance of counsel. But there is no reason to assume that lawyers would add confusion rather than clarity to the proceedings. As a profession, lawyers are skilled communicators dedicated to the service of their clients. Only if it is assumed that the average lawyer is incompetent or unscrupulous can one rationally conclude that the efficiency of the agency's work would be undermined by allowing counsel to participate whenever a veteran is willing to pay for his services. I categorically reject any such assumption.

The fact that a lawyer's services are unnecessary in most cases, and might even be counterproductive in a few, does not justify a total prohibition on their participation in all pension claim proceedings. This fact is perhaps best illustrated by *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), a case in which we held that the State does not have a constitutional obliga-

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[9] The Court's entire discussion of the bureaucratic interest is based on the assumption that the removal of the fee limitation constitutes a "proposed additional procedure." See *ante*, at 327. It would be more accurate to state that the proposal would permit more qualified spokesmen to participate in the existing procedure.

[10] The District Court unequivocally found that, apart from the paternalistic interest, the Government would not be harmed in the slightest by lifting the fee limitation. The District Court wrote:

"The government has neither argued nor shown that lifting the fee limit would harm the government in any way, except as the paternalistic protector of claimants' supposed best interests." 589 F. Supp. 1302, 1323 (ND Cal. 1984).

See also n. 8, *supra*.

tion to provide a parolee or probationer with counsel in every revocation proceeding. The informality of the proceeding makes counsel unnecessary in most cases, but we squarely held that in some cases a lawyer's presence was constitutionally required.[11] Although, surprisingly, the Court relies on *Gagnon* today, see *ante*, at 324–325, not a word in that opinion implies that a parolee or probationer could be denied the right to have retained counsel represent him. The case-by-case approach to the participation of counsel endorsed in *Gagnon*[12] is the approach that should apply to veterans claim proceedings. Lawyers may not be needed in most cases, but should be permitted in appropriate cases.[13] The interest in efficient administration plainly does not justify a total prohibition on representation by counsel. Nor can it justify a rule that indirectly accomplishes that result by discouraging their participation in all cases.

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[11] We stated:

"We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees." 411 U. S., at 790.

[12] As we expressly noted:

"The need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases." *Id.*, at 789.

[13] In *FEC* v. *National Conservative PAC*, 470 U. S., at 493, the Court noted that "allowing the presentation of views while forbidding the expenditure of more than $1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." By analogy, allowing the presentation of views by a *pro se* claimant while forbidding the expenditure of more than $10 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system.

The paternalistic interest in protecting the veteran from his own improvidence would unquestionably justify a rule that simply prevented lawyers from overcharging their clients. Most appropriately, such a rule might require agency approval, or perhaps judicial review, of counsel fees. It might also establish a reasonable ceiling, subject to exceptions for especially complicated cases. In fact, I assume that the $10-fee limitation was justified by this interest when it was first enacted in 1864. But time has brought changes in the value of the dollar, in the character of the legal profession, in agency procedures, and in the ability of the veteran to proceed without the assistance of counsel.

In 1982, the Senate Committee on Veterans' Affairs reviewed the fee limitation and concluded:

> "As was discussed in the VA's agency report on S. 330 (VA report on S. 330 at pages 16–17 (reprinted at pages 98–99 of S. Rept. No. 96–178)), the basis for Congressional action, first after the Civil War and then after World War I, limiting the amount an attorney could receive for representing a claimant before the VA was grounded in a belief that the lawyers of that day were unscrupulous and were taking unfair advantage of veterans by retaining an unwarranted portion of the veterans' statutory entitlement in return for very limited legal assistance. Whatever the merits of such a view at the time the limitation was imposed, and despite numerous court opinions upholding the validity of the statutory limitation in the face of challenges to its constitutionality (see, e. g., *Gendron* v. *Saxbe*, 389 F. Supp. 1303 (C. D. Cal.), *aff'd mem. sub nom, Gendron* v. *Levi*, 423 U. S. 802 (1975); *Staub* v. *Roudebush*, 574 F. 2d 637 (D. C. Cir. 1978)), *it is the Committee's position that such a view of today's organized bar, particularly in light of the widespread network of local bar associations that now generally police attorney behavior, is no longer tenable.*
>
> *"The Committee is also of the view that the current statutory limitation is an undue hindrance on the rights*

of veterans and other claimants to select representatives of their own choosing to represent them in VA matters. As noted above, there is a strong and vital system of veterans service officers who provide excellent representation at no cost to claimants. The Committee fully expects and believes that this system will continue and prosper, undiminished by the new right of judicial review and opportunity for attorney participation created in this legislation. However, *an individual should not be arbitrarily restricted in retaining an attorney, whether such representation is desired for reasons of personal preference or because of a concern that the claim is likely to be denied a second time by the Board of Veterans' Appeals and will be appealed to court. A claimant could well conclude, for example, that some further development of the administrative record in a complex case would be of critical importance while the matter is still before the agency and that an attorney would be better able to so develop the record.*" S. Rep. No. 97–466, pp. 50–51 (1982) (emphasis added).

Moreover, the growth of the strong system of active service officers who provide excellent representation at no cost to claimants is significant because it has virtually eliminated the danger that a claimant will be tempted to waste money on unnecessary legal services. As the Senate Committee recognized, however, the availability of such competent, free representation is not a reason for denying a claimant the right to employ counsel of his own choice in an appropriate case.

III

It is evident from what I have written that I regard the fee limitation as unwise and an insult to the legal profession. It does not follow, however, that it is unconstitutional. The Court correctly notes that the presumption of constitutionality that attaches to every Act of Congress requires the challenger to bear the burden of demonstrating its invalidity.

Before attempting to do so, I must comment on two aspects of the Court's rhetoric: Its references to the age of the statute and to the repudiation of *Lochner* v. *New York*, 198 U. S. 45 (1905).

The fact that the $10-fee limitation has been on the books since 1864 does not, in my opinion, add any force at all to the presumption of validity. Surely the age of the *de jure* segregation at issue in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), or the age of the gerrymandered voting districts at issue in *Baker* v. *Carr*, 369 U. S. 186 (1962), provided no legitimate support for those rules. In this case, the passage of time, instead of providing support for the fee limitation, has effectively eroded the one legitimate justification that formerly made the legislation rational. The age of the statute cuts against, not in favor of, its validity.

It is true that the statute that was incorrectly invalidated in *Lochner* provided protection for a group of workers, but that protection was a response to the assumed disparity in the bargaining power of employers and employees, and was justified by the interest in protecting the health and welfare of the protected group. It is rather misleading to imply that a rejection of the *Lochner* holding is an endorsement of rational paternalism as a legitimate legislative goal. See *ante*, at 323. But in any event, the kind of paternalism reflected in this statute as it operates today is irrational. It purports to protect the veteran who has little or no need for protection, and it actually denies him assistance in cases in which the help of his own lawyer may be of critical importance.[14]

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[14] Justice Brandeis' statement in *Olmstead* v. *United States*, 277 U. S. 438 (1928), is worth remembering in this context:

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Id.*, at 479 (Brandeis, J., dissenting).

But the statute is unconstitutional for a reason that is more fundamental than its apparent irrationality. What is at stake is the right of an individual to consult an attorney of his choice in connection with a controversy with the Government. In my opinion that right is firmly protected by the Due Process Clause of the Fifth Amendment[15] and by the First Amendment.[16]

The Court recognizes that the Veterans' Administration's procedures must provide claimants with due process of law, but then concludes that the constitutional requirement is satisfied because the appellees have not proved that the "probability of error under the present system" is unacceptable.[17] *Ante*, at 326. In short, if 80 or 90 percent of the cases are correctly decided, why worry about those individuals whose claims have been erroneously rejected and who might have prevailed if they had been represented by counsel?

The fundamental error in the Court's analysis is its assumption that the individual's right to employ counsel of his choice in a contest with his sovereign is a kind of second-class

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[15] Cf. *Wright* v. *Ingold*, 445 F. 2d 109, 111–112 (CA7 1971).

[16] Some propositions are so obvious that they seldom need to be stated explicitly. In a series of cases the Court has considered the extent to which the First Amendment protects the lawyer's right to solicit business, finding protection in some situations but not others. Compare *In re Primus*, 436 U. S. 412, 423–426 (1978), with *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978). But in all of those cases it was necessarily assumed that the individual's right to ask for, and to receive, legal advice from the lawyer of his choice was fully protected by the First Amendment. That assumption was explicitly acknowledged by the parties in the *Primus* case and recognized in a footnote to our opinion, 436 U. S., at 426, n. 17 ("There is no doubt that such activity is protected by the First Amendment"). If ordinary communication between attorney and client is so protected, it is doubly important to prevent abridgment of communication in support of an exercise of the right to petition the Government for the redress of a veteran's grievances. See *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 510 (1972).

[17] Indeed, at one point in its opinion the Court seems to take the position that there is no constitutional defect unless "the entire system is operated contrary to its governing regulations." *Ante*, at 324, n. 11.

interest that can be assigned a material value and balanced on a utilitarian scale of costs and benefits.[18] It is true that the veteran's right to benefits is a property right and that in fashioning the procedures for administering the benefit program, the Government may appropriately weigh the value of additional procedural safeguards against their pecuniary costs. It may, for example, properly decide not to provide free counsel to claimants. But we are not considering a procedural right that would involve any cost to the Govern-

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[18] As I explained in protesting the Court's denigration of the right to counsel in proceedings to terminate parental rights:

"The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless." *Lassiter* v. *Department of Social Services of Durham County*, 452 U. S. 18, 60 (1981) (dissenting).

Moreover, the Framers of the Constitution created a federal sovereign whose powers were to be exercised by different branches—a Legislature, an Executive, and a Judiciary—and which was expected to coexist with at least 13 other sovereigns having jurisdiction over the same people and the same territory. Surely, if they were motivated by a desire to improve the efficiency of the economy, they could have developed a much more simple design for the new Government. The reason they did not do so is perfectly clear. The text of the Constitution is replete with provisions that are intended to secure the blessings of liberty—or conversely, to protect against the dangers of tyranny—notwithstanding their possible costs. Significantly, those protections not only recognized the evils associated with a monarch, or an executive with absolute power, but also the risk of tyranny by an unrestrained majority. The limited delegations of power to the Federal Government, the tripartite division of authority among three branches of the Federal Government, the division of the Legislature into two Houses, the staggered terms of office, with Senators serving six years, the President four years, and Representatives only two, the provision for a Presidential veto of Acts of Congress, the guarantee of life tenure for federal judges—all of the checks and balances are consistent with the interest in protecting individual liberty from the possible misuse of power by a transient unrestrained majority.

ment.[19] We are concerned with the individual's right to spend his own money to obtain the advice and assistance of independent counsel in advancing his claim against the Government.[20]

In all criminal proceedings, that right is expressly protected by the Sixth Amendment. As I have indicated, in civil disputes with the Government I believe that right is also protected by the Due Process Clause of the Fifth Amendment and by the First Amendment. If the Government, in the guise of a paternalistic interest in protecting the citizen from his own improvidence, can deny him access to independent counsel of his choice, it can change the character of our free society.[21] Even though a dispute with the sovereign may only involve property rights, or as in this case a statu-

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[19] The way the Court utilizes the *Mathews* v. *Eldridge* procedural-due-process analysis is somewhat misleading. Here, appellees do not seek additional opportunities to be heard, to have counsel appointed at governmental expense, or any type of additional procedure. They simply want to exercise their right to choose, to consult, and to employ the services of legal counsel in order to conduct and manage their personal affairs—a right that should be unfettered in a free society.

[20] See *Munn* v. *Illinois*, 94 U. S. 113 (1877):

"No State 'shall deprive any person of life, liberty, or property without due process of law,' says the Fourteenth Amendment to the Constitution. . . . By the term 'liberty,' as used in the provision, something more is meant than the mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment." *Id.*, at 142 (Field, J., dissenting).

[21] As Justice Jackson recognized in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 442–443 (1950):

"The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error."

tory entitlement, the citizen's right of access to the independent, private bar is itself an aspect of liberty that is of critical importance in our democracy.[22] Just as I disagree with the present Court's crabbed view of the concept of "liberty,"[23] so do I reject its apparent unawareness of the function of the independent lawyer as a guardian of our freedom.[24]

In my view, regardless of the nature of the dispute between the sovereign and the citizen—whether it be a criminal trial, a proceeding to terminate parental rights, a claim for social security benefits, a dispute over welfare benefits, or a pension claim asserted by the widow of a soldier who was killed on the battlefield—the citizen's right to consult an independent lawyer and to retain that lawyer to speak on his or her behalf is an aspect of liberty that is priceless. It

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[22] The Solicitor General cavalierly states that "[n]othing in the First Amendment suggests that the fee limitation is unconstitutional because it restricts a claimant in hiring a private lawyer where other, adequate representation is available without charge." Brief for Appellants 47. This statement misses a principle so plain and fundamental that I would think it would not need to be stated: Every citizen in this country is presumed to be unrestricted in consulting or employing an attorney on any matter, or in making the decision that legal representation for any purpose is not needed. As to this proposition, it makes no difference whether, as the Solicitor General claims, "the existing VA claims procedure is fair and adequate without privately retained attorneys," *ibid.*, a conclusion that the District Court rejected. The statute, moreover, on the one hand, recognizes and allows legal representation, but on the other hand restricts the veteran's right to choose and to consult a legal representative in any meaningful manner, thus virtually reducing the right to counsel to nonexistence.

[23] Compare *Meachum* v. *Fano*, 427 U. S. 215, 225–226 (1976), with *id.*, at 230 (STEVENS, J., dissenting).

[24] That function was, however, well understood by Jack Cade and his followers, characters who are often forgotten and whose most famous line is often misunderstood. Dick's statement ("The first thing we do, let's kill all the lawyers") was spoken by a rebel, not a friend of liberty. See W. Shakespeare, King Henry VI, pt. II, Act IV, scene 2, line 72. As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.

should not be bargained away on the notion that a totalitarian appraisal of the mass of claims processed by the Veterans' Administration does not identify an especially high probability of error.[25]

Unfortunately, the reason for the Court's mistake today is all too obvious. It does not appreciate the value of individual liberty.

I respectfully dissent.

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[25] According to the Court, "process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them." *Ante*, at 330.

Syllabus

SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS ET AL. *v.* BALL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83–990. Argued December 5, 1984—Decided July 1, 1985

Petitioner School District adopted two programs—Shared Time and Community Education—that provide classes to nonpublic school students at public expense in classrooms located in and leased from the nonpublic schools. The Shared Time program offers classes during the regular schoolday that are intended to supplement the "core curriculum" courses required by the State. The Shared Time teachers are full-time employees of the public schools, but a "significant portion" of them had previously taught in nonpublic schools. The Community Education program offers classes at the conclusion of the regular schoolday in voluntary courses, some of which are not offered at the public schools but others of which are. Community Education teachers are part-time public school employees who for the most part are otherwise employed full time by the same nonpublic school in which their Community Education classes are held. Of the 41 private schools involved in these programs, 40 are identifiably religious schools. The students attending both programs are the same students who otherwise attend the particular school in which the classes are held. Respondent taxpayers filed suit in Federal District Court against the School District and certain state officials, alleging that both programs violated the Establishment Clause of the First Amendment, made applicable to the States through the Fourteenth Amendment. The court agreed, entered a judgment for respondents, and enjoined further operation of the programs. The Court of Appeals affirmed.

Held: The Shared Time and Community Education programs have the "primary or principal" effect of advancing religion, and therefore violate the dictates of the Establishment Clause. Pp. 381–398.

(a) Even the praiseworthy, secular purpose of providing for the education of schoolchildren cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion or religion generally or when the aid unduly entangles the government in matters religious. Pp. 381–383.

(b) The challenged programs have the effect of impermissibly promoting religion in three ways. First, the state-paid teachers, influenced by the pervasively sectarian nature of the religious schools in which they

work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense. Second, the symbolic union of church and state inherent in the provision of secular state-provided public instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public. Third, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects. Pp. 384–398.

718 F. 2d 1389, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BURGER, C. J., *post*, p. 398, and O'CONNOR, J., *post*, p. 398, filed opinions concurring in the judgment in part and dissenting in part. WHITE, J., *post*, p. 400, and REHNQUIST, J., *post*, p. 400, filed dissenting opinions.

Kenneth F. Ripple, Special Assistant Attorney General of Michigan, argued the cause for petitioners. With him on the briefs were *William S. Farr*, *John R. Oostema*, *Stuart D. Hubbell*, *Frank J. Kelley*, Attorney General, *Louis J. Caruso*, Solicitor General, and *Gerald F. Young*, Assistant Attorney General.

Michael W. McConnell argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Acting Assistant Attorney General Willard*, *Deputy Solicitor General Bator*, *Deputy Assistant Attorney General Kuhl*, *Anthony J. Steinmeyer*, and *Michael Jay Singer*.

A. E. Dick Howard argued the cause for respondents. On the brief was *Albert R. Dilley*.*

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*Briefs of *amici curiae* urging reversal were filed for the National Jewish Commission on Law and Public Affairs (COLPA) by *Nathan Lewin*, *Dennis Rapps*, and *Daniel D. Chazin*; and for the United States Catholic Conference by *Wilfred R. Caron* and *John A. Liekweg*.

Briefs of *amici curiae* urging affirmance were filed for the American Jewish Congress et al. by *Marc D. Stern*, *Ronald A. Krauss*, *Jack D. Novik*, *Burt Neuborne*, *Charles S. Sims*, *Justin Finger*, and *Jeffrey Sinensky*; for Americans United for Separation of Church and State by *Lee Boothby*; and for the Baptist Joint Committee on Public Affairs et al. by *John W. Baker*.

JUSTICE BRENNAN delivered the opinion of the Court.

The School District of Grand Rapids, Michigan, adopted two programs in which classes for nonpublic school students are financed by the public school system, taught by teachers hired by the public school system, and conducted in "leased" classrooms in the nonpublic schools. Most of the nonpublic schools involved in the programs are sectarian religious schools. This case raises the question whether these programs impermissibly involve the government in the support of sectarian religious activities and thus violate the Establishment Clause of the First Amendment.

I

A

At issue in this case are the Community Education and Shared Time programs offered in the nonpublic schools of Grand Rapids, Michigan. These programs, first instituted in the 1976–1977 school year, provide classes to nonpublic school students at public expense in classrooms located in and leased from the local nonpublic schools.

The Shared Time program offers classes during the regular schoolday that are intended to be supplementary to the "core curriculum" courses that the State of Michigan requires as a part of an accredited school program. Among the subjects offered are "remedial" and "enrichment" mathematics, "remedial" and "enrichment" reading, art, music, and physical education. A typical nonpublic school student attends these classes for one or two class periods per week; approximately "ten percent of any given nonpublic school student's time during the academic year would consist of Shared Time instruction." *Americans United for Separation of Church and State* v. *School Dist. of Grand Rapids*, 546 F. Supp. 1071, 1079 (WD Mich. 1982). Although Shared Time itself is a program offered only in the nonpublic schools, there was testimony that the courses included in that program are offered, albeit perhaps in a somewhat different form, in the

public schools as well. All of the classes that are the subject of this case are taught in elementary schools, with the exception of Math Topics, a remedial mathematics course taught in the secondary schools.[1]

The Shared Time teachers are full-time employees of the public schools, who often move from classroom to classroom during the course of the schoolday. A "significant portion" of the teachers (approximately 10%) "previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed." *Id.*, at 1078. The School District of Grand Rapids hires Shared Time teachers in accordance with its ordinary hiring procedures. *Ibid.* The public school system apparently provides all of the supplies, materials, and equipment used in connection with Shared Time instruction. See App. 341.

The Community Education program is offered throughout the Grand Rapids community in schools and on other sites, for children as well as adults. The classes at issue here are taught in the nonpublic elementary schools and commence at the conclusion of the regular schoolday. Among the courses offered are Arts and Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts and Crafts, Drama, Newspaper, Humanities, Chess, Model

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[1] Shared Time and Community Education courses are taught at the elementary and secondary level in nonpublic schools. However, after the District Court found for respondents and enjoined the further operation of the programs, petitioners did not appeal the decision to the extent that it involved "physical education and industrial arts shared time classes at the secondary level and community education classes at the secondary level." App. 39. Thus, the appeal involved only Shared Time classes at the elementary level, Community Education classes at the elementary level, and the remedial mathematics Shared Time class at the secondary level. *Americans United for Separation of Church and State* v. *School Dist. of Grand Rapids*, 718 F. 2d 1389, 1390 (CA6 1983). These are the only programs whose constitutionality is now before the Court.

Building, and Nature Appreciation. The District Court found that "[a]lthough certain Community Education courses offered at nonpublic school sites are not offered at the public schools on a Community Education basis, all Community Education programs are otherwise available at the public schools, usually as a part of their more extensive regular curriculum." 546 F. Supp., at 1079.

Community Education teachers are part-time public school employees. Community Education courses are completely voluntary and are offered only if 12 or more students enroll. Because a well-known teacher is necessary to attract the requisite number of students, the School District accords a preference in hiring to instructors already teaching within the school. Thus, "virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school." *Ibid.*

Both programs are administered similarly. The Director of the program, a public school employee, sends packets of course listings to the participating nonpublic schools before the school year begins. The nonpublic school administrators then decide which courses they want to offer. The Director works out an academic schedule for each school, taking into account, *inter alia*, the varying religious holidays celebrated by the schools of different denominations.

Nonpublic school administrators decide which classrooms will be used for the programs, and the Director then inspects the facilities and consults with Shared Time teachers to make sure the facilities are satisfactory. The public school system pays the nonpublic schools for the use of the necessary classroom space by entering into "leases" at the rate of $6 per classroom per week. The "leases," however, contain no mention of the particular room, space, or facility leased and teachers' rooms, libraries, lavatories, and similar facilities are made available at no additional charge. *Id.*, at 1077.

Each room used in the programs has to be free of any crucifix, religious symbol, or artifact, although such religious symbols can be present in the adjoining hallways, corridors, and other facilities used in connection with the program. During the time that a given classroom is being used in the programs, the teacher is required to post a sign stating that it is a "public school classroom."[2] However, there are no signs posted outside the school buildings indicating that public school courses are conducted inside or that the facilities are being used as a public school annex.

Although petitioners label the Shared Time and Community Education students as "part-time public school students," the students attending Shared Time and Community Education courses in facilities leased from a nonpublic school are the same students who attend that particular school otherwise. *Id.*, at 1078. There is no evidence that any public school student has ever attended a Shared Time or Community Education class in a nonpublic school. *Id.*, at 1097. The District Court found that "[t]hough Defendants claim the Shared Time program is available to all students, the record is abundantly clear that only nonpublic school students wearing the cloak of a 'public school student' can enroll in it." *Ibid.* The District Court noted that "[w]hereas public school students are assembled at the public facility nearest to their residence, students in religious schools are assembled on the basis of religion without any consideration of residence or school district boundaries." *Id.*, at 1093. Thus, "beneficiaries are wholly designated on the basis of religion," *ibid.*, and these "public school" classes, in contrast to ordinary public

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[2] The signs read as follows: "GRAND RAPIDS PUBLIC SCHOOLS' ROOM. THIS ROOM HAS BEEN LEASED BY THE GRAND RAPIDS PUBLIC SCHOOL DISTRICT, FOR THE PURPOSE OF CONDUCTING PUBLIC SCHOOL EDUCATIONAL PROGRAMS. THE ACTIVITY IN THIS ROOM IS CONTROLLED SOLELY BY THE GRAND RAPIDS PUBLIC SCHOOL DISTRICT." App. 200.

school classes which are largely neighborhood based, are as segregated by religion as are the schools at which they are offered.[3]

Forty of the forty-one schools at which the programs operate are sectarian in character.[4] The schools of course vary from one another, but substantial evidence suggests that they share deep religious purposes. For instance, the Parent Handbook of one Catholic school states the goals of Catholic education as "[a] God oriented environment which *permeates* the total educational program," "[a] Christian atmosphere which guides and encourages participation in the church's commitment to social justice," and "[a] continuous development of knowledge of the Catholic faith, its traditions, teachings and theology." *Id.*, at 1080. A policy statement of the Christian schools similarly proclaims that "it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but *the Word of God must be an all-pervading force in the educational program.*" *Id.*, at 1081. These Christian schools require all parents seeking to enroll their children either to subscribe to a particular doctrinal statement or to agree to have their children taught according to the doctrinal statement. The District Court found that the schools are "pervasively sectarian," *id.*, at 1096, n. 13, and concluded "without hesitation that the purposes of these schools is to advance their particular religions," *id.*, at 1096, and that "a substantial portion of their functions are subsumed in the religious mission." *Id.*, at 1084.

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[3] As would be expected, a large majority of the students attending religious schools belong to the denomination that controls the school. The District Court found, for instance, that approximately 85% of the students at the Catholic schools are Catholic. 546 F. Supp., at 1080.

[4] Twenty-eight of the schools are Roman Catholic, seven are Christian Reformed, three are Lutheran, one is Seventh Day Adventist, and one is Baptist.

B

Respondents are six taxpayers who filed suit against the School District of Grand Rapids and a number of state officials. They charged that the Shared Time and Community Education programs violated the Establishment Clause of the First Amendment of the Constitution, made applicable to the States through the Fourteenth Amendment. *Everson* v. *Board of Education*, 330 U. S. 1 (1947). After an 8-day bench trial, the District Court entered a judgment on the merits on behalf of respondents and enjoined further operation of the programs.[5]

Applying the familiar three-part purpose, effect, and entanglement test set out in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), the court held that, although the purpose of the programs was secular, their effect was "distinctly impermissible." 546 F. Supp., at 1093. The court relied in particular on the fact that the programs at issue involved publicly provided instructional services that served nonpublic school students segregated largely by religion on nonpublic school premises. The court also noted that the programs conferred "direct benefits, both financial and otherwise, to the sectarian institutions." *Id.*, at 1094. Finally, the court found that the programs necessarily entailed an unacceptable level of entanglement, both political and administrative, between the

[5] Petitioners alleged that respondents lacked taxpayer standing under *Flast* v. *Cohen*, 392 U. S. 83 (1968), and *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982). The District Court and the Court of Appeals rejected the standing challenge. We affirm this finding, relying on the numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools. See, *e. g.*, *Wolman* v. *Walter*, 433 U. S. 229 (1977); *Roemer* v. *Maryland Public Works Board*, 426 U. S. 736, 744 (1976); *Meek* v. *Pittenger*, 421 U. S. 349, 356–357, n. 6 (1975); *Sloan* v. *Lemon*, 413 U. S. 825 (1973); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 762 (1973); *Hunt* v. *McNair*, 413 U. S. 734, 735 (1973); *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U. S. 472, 478 (1973); *Lemon* v. *Kurtzman*, 403 U. S. 602, 608, 611 (1971); *Everson* v. *Board of Education*, 330 U. S. 1, 3 (1947).

public school systems and the sectarian schools. Petitioners appealed the judgment of the District Court to the Court of Appeals for the Sixth Circuit. A divided panel of the Court of Appeals affirmed. *Americans United for Separation of Church and State* v. *School Dist. of Grand Rapids*, 718 F. 2d 1389 (1983). We granted certiorari, 465 U. S. 1064 (1984), and now affirm.

II

A

The First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion," as our cases demonstrate, is more than a pledge that no single religion will be designated as a state religion. *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 771 (1973); *Lemon* v. *Kurtzman*, *supra*, at 612; *McGowan* v. *Maryland*, 366 U. S. 420, 442 (1961). It is also more than a mere injunction that governmental programs discriminating among religions are unconstitutional. See, *e. g.*, *Abington School District* v. *Schempp*, 374 U. S. 203, 216–217 (1963); *McCollum* v. *Board of Education*, 333 U. S. 203, 211 (1948). The Establishment Clause instead primarily proscribes "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Nyquist*, *supra*, at 772; see also *Walz* v. *Tax Comm'n*, 397 U. S. 664, 668 (1970). As Justice Black, writing for the Court in *Everson* v. *Board of Education*, *supra*, at 15–16, stated: "Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

Since *Everson* made clear that the guarantees of the Establishment Clause apply to the States, we have often grappled with the problem of state aid to nonpublic, religious schools. In all of these cases, our goal has been to give meaning to the sparse language and broad purposes of the

Clause, while not unduly infringing on the ability of the States to provide for the welfare of their people in accordance with their own particular circumstances. Providing for the education of schoolchildren is surely a praiseworthy purpose. But our cases have consistently recognized that even such a praiseworthy, secular purpose cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion or religion generally or when the aid unduly entangles the government in matters religious. For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and nonreligion. Only in this way can we "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" and "sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach* v. *Clauson*, 343 U. S. 306, 313 (1952).

We have noted that the three-part test first articulated in *Lemon* v. *Kurtzman*, *supra*, at 612–613, guides "[t]he general nature of our inquiry in this area," *Mueller* v. *Allen*, 463 U. S. 388, 394 (1983):

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary

> effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz* [v. *Tax Comm'n*, 397 U. S., at 674]." *Lemon* v. *Kurtzman*, 403 U. S., at 612–613.

These tests "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek* v. *Pittenger*, 421 U. S. 349, 359 (1975). We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children. The government's activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic. See *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, at 796–798; *Lemon* v. *Kurtzman*, *supra*, at 622–624. The *Lemon* test concentrates attention on the issues—purposes, effect, entanglement—that determine whether a particular state action is an improper "law respecting an establishment of religion." We therefore reaffirm that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria.

As has often been true in school aid cases, there is no dispute as to the first test. Both the District Court and the Court of Appeals found that the purpose of the Community Education and Shared Time programs was "manifestly secular." 546 F. Supp., at 1085; see also 718 F. 2d, at 1398. We find no reason to disagree with this holding, and therefore go on to consider whether the primary or principal effect of the challenged programs is to advance or inhibit religion.

B

Our inquiry must begin with a consideration of the nature of the institutions in which the programs operate. Of the 41 private schools where these "part-time public schools" have operated, 40 are identifiably religious schools. It is true that each school may not share all of the characteristics of religious schools as articulated, for example, in the complaint in *Meek* v. *Pittenger*, *supra*, at 356; see also *Lemon* v. *Kurtzman*, *supra*, at 615. The District Court found, however, that "[b]ased upon the massive testimony and exhibits, the conclusion is inescapable that the religious institutions receiving instructional services from the public schools are sectarian in the sense that a substantial portion of their functions are subsumed in the religious mission." 546 F. Supp., at 1084; see *Hunt* v. *McNair*, 413 U. S. 734, 735 (1973); *Meek* v. *Pittenger*, *supra*, at 366 ("The very purpose of many of those schools is to provide an integrated secular and religious education"); *Walz* v. *Tax Comm'n*, 397 U. S., at 671 ("to assure future adherents to a particular faith" is "an affirmative if not dominant policy of church schools"). At the religious schools here—as at the sectarian schools that have been the subject of our past cases—"the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within that institution, the two are inextricably intertwined."[6] *Lemon* v. *Kurtzman*, *supra*, at 657 (opinion of BRENNAN, J.). See also *Meek* v. *Pittenger*, *supra*, at 365–366; *Board of Education* v. *Allen*, 392 U. S. 236, 245, 247–248 (1968).

[6]The elementary and secondary schools in this case differ substantially from the colleges that we refused to characterize as "pervasively sectarian" in *Roemer* v. *Maryland Public Works Board*, 426 U. S., at 755–759. See also *Hunt* v. *McNair*, 413 U. S. 734 (1973); *Tilton* v. *Richardson*, 403 U. S. 672 (1971). Many of the schools in this case include prayer and attendance at religious services as a part of their curriculum, are run by churches or other organizations whose members must subscribe to particular religious tenets, have faculties and student bodies composed largely of adherents of the particular denomination, and give preference in attendance to children belonging to the denomination. 546 F. Supp., at 1080–1084.

Given that 40 of the 41 schools in this case are thus "pervasively sectarian," the challenged public school programs operating in the religious schools may impermissibly advance religion in three different ways. First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.

(1)

Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith. See *Stone* v. *Graham*, 449 U. S. 39 (1980) *(per curiam)*; *Meek* v. *Pittenger*, *supra*, at 370; *Lemon* v. *Kurtzman*, *supra*, at 619 ("The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion"); *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U. S. 472, 480 (1973) ("[T]he State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination"); *Engel* v. *Vitale*, 370 U. S. 421, 429 (1962); *Zorach* v. *Clauson*, 343 U. S., at 314 ("Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education . . ."). Such indoctrination, if permitted to occur, would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State, while at the same time tainting the resulting religious beliefs with a corrosive secularism.

In *Meek* v. *Pittenger*, 421 U. S. 349 (1975), the Court invalidated a statute providing for the loan of state-paid professional staff—including teachers—to nonpublic schools to provide remedial and accelerated instruction, guidance counseling and testing, and other services on the premises of the nonpublic schools. Such a program, if not subjected to a "comprehensive, discriminating, and continuing state surveillance," *Lemon* v. *Kurtzman*, 403 U. S., at 619 (quoted in *Meek*, *supra*, at 370), would entail an unacceptable risk that the state-sponsored instructional personnel would "advance the religious mission of the church-related schools in which they serve." *Meek*, 421 U. S., at 370. Even though the teachers were paid by the State, "[t]he potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present." *Id.*, at 372. The program in *Meek*, if not sufficiently monitored, would simply have entailed too great a risk of state-sponsored indoctrination.

The programs before us today share the defect that we identified in *Meek*. With respect to the Community Education program, the District Court found that "virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school." 546 F. Supp., at 1079. These instructors, many of whom no doubt teach in the religious schools precisely because they are adherents of the controlling denomination and want to serve their religious community zealously, are expected during the regular schoolday to inculcate their students with the tenets and beliefs of their particular religious faiths. Yet the premise of the program is that those instructors can put aside their religious convictions and engage in entirely secular Community Education instruction as soon as the schoolday is over. Moreover, they are expected to do so before the same religious school students and in the same religious school classrooms that they employed to advance religious purposes

during the "official" schoolday. Nonetheless, as petitioners themselves asserted, Community Education classes are not specifically monitored for religious content. App. 353.

We do not question that the dedicated and professional religious school teachers employed by the Community Education program will attempt in good faith to perform their secular mission conscientiously. Cf. *Lemon*, *supra*, at 618–619. Nonetheless, there is a substantial risk that, overtly or subtly, the religious message they are expected to convey during the regular schoolday will infuse the supposedly secular classes they teach after school. The danger arises "not because the public employee [is] likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course." *Wolman* v. *Walter*, 433 U. S. 229, 247 (1977). "The conflict of functions inheres in the situation." *Lemon* v. *Kurtzman*, *supra*, at 617.

The Shared Time program, though structured somewhat differently, nonetheless also poses a substantial risk of state-sponsored indoctrination. The most important difference between the programs is that most of the instructors in the Shared Time program are full-time teachers hired by the public schools. Moreover, although "virtually every" Community Education instructor is a full-time religious school teacher, 546 F. Supp., at 1079, only "[a] significant portion" of the Shared Time instructors previously worked in the religious schools.[7] *Id.*, at 1078. Nonetheless, as with the Community Education program, no attempt is made to monitor the Shared Time courses for religious content. App. 330.[8]

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[7] Approximately 10% of the Shared Time instructors were previously employed by the religious schools, and many of these were reassigned back to the school at which they had previously taught.

[8] The public school system does include Shared Time teachers in its ordinary teacher evaluation program, which subjects them to evaluation once each year during their first year of teaching and once every three years after that. App. 54, 330.

Thus, despite these differences between the two programs, our holding in *Meek* controls the inquiry with respect to Shared Time, as well as Community Education. Shared Time instructors are teaching academic subjects in religious schools in courses virtually indistinguishable from the other courses offered during the regular religious schoolday. The teachers in this program, even more than their Community Education colleagues, are "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Meek* v. *Pittenger*, 421 U. S., at 371. Teachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect. As we stated in *Meek*, "[w]hether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." *Id.*, at 370. Unlike types of aid that the Court has upheld, such as state-created standardized tests, *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U. S. 646 (1980), or diagnostic services, *Wolman* v. *Walter*, *supra*, at 241–244, there is a "substantial risk" that programs operating in this environment would "be used for religious educational purposes." *Committee for Public Education & Religious Liberty* v. *Regan*, *supra*, at 656.

The Court of Appeals of course recognized that respondents adduced no evidence of specific incidents of religious indoctrination in this case. 718 F. 2d, at 1404. But the absence of proof of specific incidents is not dispositive. When conducting a supposedly secular class in the pervasively sectarian environment of a religious school, a teacher may knowingly or unwillingly tailor the content of the course to fit the school's announced goals. If so, there is no reason to believe

that this kind of ideological influence would be detected or reported by students, by their parents, or by the school system itself. The students are presumably attending religious schools precisely in order to receive religious instruction. After spending the balance of their schoolday in classes heavily influenced by a religious perspective, they would have little motivation or ability to discern improper ideological content that may creep into a Shared Time or Community Education course. Neither their parents nor the parochial schools would have cause to complain if the effect of the publicly supported instruction were to advance the schools' sectarian mission. And the public school system itself has no incentive to detect or report any specific incidents of improper state-sponsored indoctrination. Thus, the lack of evidence of specific incidents of indoctrination is of little significance.

(2)

Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated. See *Lynch* v. *Donnelly*, 465 U. S. 668, 688 (1984) (O'CONNOR, J., concurring); cf. *Abington School District* v. *Schempp*, 374 U. S., at 222 (history teaches that "powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies"). As we stated in *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116, 125–126 (1982): "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to

religion in the minds of some by reason of the power conferred." See also *Widmar* v. *Vincent*, 454 U. S. 263, 274 (1981) (finding effect "incidental" and not "primary" because it "does not confer any imprimatur of state approval on religious sects or practices").

It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years.[9] Cf. *Widmar* v. *Vincent*, *supra*, at 274; *Tilton* v. *Richardson*, 403 U. S. 672, 685–686 (1971). The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.

Our school-aid cases have recognized a sensitivity to the symbolic impact of the union of church and state. Grappling with problems in many ways parallel to those we face today, *McCollum* v. *Board of Education*, 333 U. S. 203 (1948), held that a public school may not permit part-time religious instruction on its premises as a part of the school program, even if participation in that instruction is entirely voluntary and even if the instruction itself is conducted only by nonpubic school personnel. Yet in *Zorach* v. *Clauson*, 343 U. S.

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[9] For instance, this Court has held that prayers conducted at the commencement of a legislative session do not violate the Establishment Clause, in part because of long historical usage and lack of particular sectarian content. *Marsh* v. *Chambers*, 463 U. S. 783, 795 (1983). But we have never indulged a similar assumption with respect to prayers conducted at the opening of the schoolday. *Abington School District* v. *Schempp*, 374 U. S. 203 (1963); *Engel* v. *Vitale*, 370 U. S. 421 (1962).

306 (1952), the Court held that a similar program conducted off the premises of the public school passed constitutional muster. The difference in symbolic impact helps to explain the difference between the cases. The symbolic connection of church and state in the *McCollum* program presented the students with a graphic symbol of the "concert or union or dependency" of church and state, see *Zorach*, *supra*, at 312. This very symbolic union was conspicuously absent in the *Zorach* program.[10]

In the programs challenged in this case, the religious school students spend their typical schoolday moving between religious school and "public school" classes. Both types of classes take place in the same religious school building and both are largely composed of students who are adherents of the same denomination. In this environment, the students would be unlikely to discern the crucial difference between the religious school classes and the "public school" classes, even if the latter were successfully kept free of religious indoctrination. As one commentator has written:

> "This pervasive [religious] atmosphere makes on the young student's mind a lasting imprint that the holy and transcendental should be central to all facets of life. It increases respect for the church as an institution to guide one's total life adjustments and undoubtedly helps stimulate interest in religious vocations. . . . In short, the parochial school's total operation serves to fulfill both secular and religious functions concurrently, and the two cannot be completely separated. Support of any part of its activity entails some support of the disqualifying religious function of molding the religious personality

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[10] Compare *Meek* v. *Pittenger*, 421 U. S., at 367–373 (invalidating program providing for state-funded remedial services on religious school premises), with *Wolman* v. *Walter*, 433 U. S., at 244–248 (upholding program providing for similar services at neutral sites off the premises of the religious school).

> of the young student." Giannella, Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle, 81 Harv. L. Rev. 513, 574 (1968).

Consequently, even the student who notices the "public school" sign[11] temporarily posted would have before him a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day.

As Judge Friendly, writing for the Second Circuit in the companion case to the case at bar, stated:

> "Under the City's plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same building, teach the same students, and confer with the teachers hired by the religious schools, many of them members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public." *Felton* v. *Secretary, United States Dept. of Ed.*, 739 F. 2d 48, 67–68 (1984).

This effect—the symbolic union of government and religion in one sectarian enterprise—is an impermissible effect under the Establishment Clause.

(3)

In *Everson* v. *Board of Education*, 330 U. S. 1 (1947), the Court stated that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.*, at 16. With but one exception, our subsequent cases have struck down attempts by States to make payments out of public tax dollars

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[11] See n. 2, *supra*.

directly to primary or secondary religious educational institutions. See, *e. g.*, *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S., at 774–781 (reimbursement for maintenance and repair expenses); *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U. S. 472 (1973) (reimbursement for teacher-prepared tests); *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971) (salary supplements for nonpublic school teachers). But see *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U. S. 646 (1980) (permitting public subsidy for certain routinized recordkeeping and testing services performed by nonpublic schools but required by state law).

Aside from cash payments, the Court has distinguished between two categories of programs in which public funds are used to finance secular activities that religious schools would otherwise fund from their own resources. In the first category, the Court has noted that it is "well established . . . that not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, at 771; *Roemer* v. *Maryland Public Works Board*, 426 U. S. 736, 747 (1976); *Hunt* v. *McNair*, 413 U. S., at 742–743. In such "indirect" aid cases, the government has used primarily secular means to accomplish a primarily secular end, and no "primary effect" of advancing religion has thus been found. On this rationale, the Court has upheld programs providing for loans of secular textbooks to nonpublic school students, *Board of Education* v. *Allen*, 392 U. S. 236 (1968); see also *Wolman* v. *Walter*, 433 U. S., at 236–238; *Meek* v. *Pittenger*, 421 U. S., at 359–362, and programs providing bus transportation for nonpublic school children, *Everson* v. *Board of Education*, *supra*.

In the second category of cases, the Court has relied on the Establishment Clause prohibition of forms of aid that provide "direct and substantial advancement of the sectarian enterprise." *Wolman* v. *Walter*, *supra*, at 250. In such "direct

aid" cases, the government, although acting for a secular purpose, has done so by directly supporting a religious institution. Under this rationale, the Court has struck down state schemes providing for tuition grants and tax benefits for parents whose children attend religious school, see *Sloan* v. *Lemon*, 413 U. S. 825 (1973); *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, at 780–794, and programs providing for "loan" of instructional materials to be used in religious schools, see *Wolman* v. *Walter*, *supra*, at 248–251; *Meek* v. *Pittenger*, *supra*, at 365. In *Sloan* and *Nyquist*, the aid was formally given to parents and not directly to the religious schools, while in *Wolman* and *Meek*, the aid was in-kind assistance rather than the direct contribution of public funds. Nonetheless, these differences in form were insufficient to save programs whose effect was indistinguishable from that of a direct subsidy to the religious school.

Thus, the Court has never accepted the mere possibility of subsidization, as the above cases demonstrate, as sufficient to invalidate an aid program. On the other hand, this effect is not wholly unimportant for Establishment Clause purposes. If it were, the public schools could gradually take on themselves the entire responsibility for teaching secular subjects on religious school premises. The question in each case must be whether the effect of the proffered aid is "direct and substantial," *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, at 784–785, n. 39, or indirect and incidental.[12] "The problem, like many problems in constitutional law, is one of degree." *Zorach* v. *Clauson*, 343 U. S., at 314.

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[12] This "indirect subsidy" effect only evokes Establishment Clause concerns when the public funds flow to "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . ." *Hunt* v. *McNair*, 413 U. S., at 743. In this case, the District Court explicitly found that 40 of the 41 participating nonpublic schools were pervasively religious in this sense. 546 F. Supp., at 1080. For this reason, the inquiry into whether the aid is "direct and substantial" is necessary.

We have noted in the past that the religious school has dual functions, providing its students with a secular education while it promotes a particular religious perspective. See *Mueller* v. *Allen*, 463 U. S., at 401–402; *Board of Education* v. *Allen*, *supra*. In *Meek* and *Wolman*, we held unconstitutional state programs providing for loans of instructional equipment and materials to religious schools, on the ground that the programs advanced the "primary, religion-oriented educational function of the sectarian school." *Meek*, *supra*, at 364; *Wolman*, *supra*, at 248–251. Cf. *Wolman*, *supra*, at 243 (upholding provision of diagnostic services, which were "'general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools,'" quoting *Meek*, *supra*, at 371, n. 21). The programs challenged here, which provide teachers in addition to the instructional equipment and materials, have a similar—and forbidden—effect of advancing religion. This kind of direct aid to the educational function of the religious school is indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause.

Petitioners claim that the aid here, like the textbooks in *Allen*, flows primarily to the students, not to the religious schools.[13] Of course, all aid to religious schools ultimately "flows to" the students, and petitioners' argument if accepted would validate all forms of nonideological aid to religious schools, including those explicitly rejected in our prior cases. Yet in *Meek*, we held unconstitutional the loan of instructional materials to religious schools and in *Wolman*, we rejected the fiction that a similar program could be saved by masking it as aid to individual students. *Wolman*, 433

[13] Petitioners also cite *Mueller* v. *Allen*, 463 U. S. 388 (1983), which upheld a general tax deduction available to parents of all schoolchildren for school expenses, including tuition to religious schools. *Mueller*, however, is quite unlike the instant case. Unlike *Mueller*, the aid provided here is unmediated by the tax code and the "numerous, private choices of individual parents of school-age children." *Id.*, at 399.

U. S., at 249, n. 16. It follows *a fortiori* that the aid here, which includes not only instructional materials but also the provision of instructional services by teachers in the parochial school building, "inescapably [has] the primary effect of providing a direct and substantial advancement of the sectarian enterprise." *Id.*, at 250. Where, as here, no meaningful distinction can be made between aid to the student and aid to the school, "the concept of a loan to individuals is a transparent fiction." *Wolman* v. *Walter*, *supra*, at 264 (opinion of POWELL, J.).

Petitioners also argue that this "subsidy" effect is not significant in this case, because the Community Education and Shared Time programs supplemented the curriculum with courses not previously offered in the religious schools and not required by school rule or state regulation. Of course, this fails to distinguish the programs here from those found unconstitutional in *Meek*. See 421 U. S., at 368. As in *Meek*, we do not find that this feature of the program is controlling. First, there is no way of knowing whether the religious schools would have offered some or all of these courses if the public school system had not offered them first. The distinction between courses that "supplement" and those that "supplant" the regular curriculum is therefore not nearly as clear as petitioners allege. Second, although the precise courses offered in these programs may have been new to the participating religious schools, their general subject matter—reading, mathematics, etc.—was surely a part of the curriculum in the past, and the concerns of the Establishment Clause may thus be triggered despite the "supplemental" nature of the courses. Cf. *Meek* v. *Pittenger*, 421 U. S., at 370–371. Third, and most important, petitioners' argument would permit the public schools gradually to take over the entire secular curriculum of the religious school, for the latter could surely discontinue existing courses so that they might be replaced a year or two later by a Community Education or Shared Time course with the same content. The average

religious school student, for instance, now spends 10% of the schoolday in Shared Time classes. But there is no principled basis on which this Court can impose a limit on the percentage of the religious schoolday that can be subsidized by the public school. To let the genie out of the bottle in this case would be to permit ever larger segments of the religious school curriculum to be turned over to the public school system, thus violating the cardinal principle that the State may not in effect become the prime supporter of the religious school system. See *Lemon* v. *Kurtzman*, 403 U. S., at 624–625.

III

We conclude that the challenged programs have the effect of promoting religion in three ways.[14] The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense. The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public. Finally, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects. For these reasons, the conclusion is inescapable that the Community Education and Shared Time programs have the "primary or principal" effect of advancing religion, and therefore violate the dictates of the Establishment Clause of the First Amendment.

Nonpublic schools have played an important role in the development of American education, and we have long recog-

[14] Because of this conclusion, we need not determine whether aspects of the challenged programs impermissibly entangle the government in religious matters, in violation of the third prong of the *Lemon* test. But see *Aguilar* v. *Felton*, *post*, p. 402.

nized that parents and their children have the right to choose between public schools and available sectarian alternatives. As THE CHIEF JUSTICE noted in *Lemon* v. *Kurtzman*, *supra*, at 625: "[N]othing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous." But the Establishment Clause "rest[s] on the belief that a union of government and religion tends to destroy government and to degrade religion." *Engel* v. *Vitale*, 370 U. S., at 431. Therefore, "[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn." *Lemon* v. *Kurtzman*, *supra*, at 625. Because "the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined," *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S., at 761, the position of those lines has by now become quite clear and requires affirmance of the Court of Appeals.

It is so ordered.

CHIEF JUSTICE BURGER, concurring in the judgment in part and dissenting in part.

I agree with the Court that, under our decisions in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), and *Earley* v. *DiCenso*, decided together with *Lemon*, the Grand Rapids Community Education program violates the Establishment Clause. As to the Shared Time program, I dissent for the reasons stated in my dissenting opinion in *Aguilar* v. *Felton*, *post*, p. 402.

JUSTICE O'CONNOR, concurring in the judgment in part and dissenting in part.

For the reasons stated in my dissenting opinion in *Aguilar* v. *Felton*, *post*, p. 402, I dissent from the Court's holding that the Grand Rapids Shared Time program impermissibly

advances religion. Like the New York Title I program, the Grand Rapids Shared Time program employs full-time public school teachers who offer supplemental instruction to parochial school children on the premises of religious schools. Nothing in the record indicates that Shared Time instructors have attempted to proselytize their students. I see no reason why public school teachers in Grand Rapids are any more likely than their counterparts in New York to disobey their instructions.

The Court relies on the District Court's finding that a "significant portion of the Shared Time instructors previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed." *Americans United for Separation of Church and State* v. *School Dist. of Grand Rapids*, 546 F. Supp. 1071, 1078 (WD Mich. 1982). See *ante*, at 376, 387, and n. 7. In fact, only 13 Shared Time instructors have ever been employed by any parochial school, and only a fraction of those 13 now work in a parochial school where they were previously employed. App. 193. The experience of these few teachers does not significantly increase the risk that the perceived or actual effect of the Shared Time program will be to inculcate religion at public expense. I would uphold the Shared Time program.

I agree with the Court, however, that the Community Education program violates the Establishment Clause. The record indicates that Community Education courses in the parochial schools are overwhelmingly taught by instructors who are current full-time employees of the parochial school. The teachers offer secular subjects to the same parochial school students who attend their regular parochial school classes. In addition, the supervisors of the Community Education program in the parochial schools are by and large the principals of the very schools where the classes are offered. When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students

under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools. This is particularly the case where, as here, religion pervades the curriculum and the teachers are accustomed to bring religion to play in everything they teach. I concur in the judgment of the Court that the Community Education program violates the Establishment Clause.

JUSTICE WHITE, dissenting.*

As evidenced by my dissenting opinions in *Lemon* v. *Kurtzman*, 403 U. S. 602, 661 (1971), and *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 813 (1973), I have long disagreed with the Court's interpretation and application of the Establishment Clause in the context of state aid to private schools. For the reasons stated in those dissents, I am firmly of the belief that the Court's decisions in these cases, like its decisions in *Lemon* and *Nyquist*, are "not required by the First Amendment and [are] contrary to the long-range interests of the country." 413 U. S., at 820. For those same reasons, I am satisfied that what the States have sought to do in these cases is well within their authority and is not forbidden by the Establishment Clause. Hence, I dissent and would reverse the judgment in each of these cases.

JUSTICE REHNQUIST, dissenting.

I dissent for the reasons stated in my dissenting opinion in *Wallace* v. *Jaffree*, 472 U. S. 38 (1985). The Court relies heavily on the principles of *Everson* v. *Board of Education*, 330 U. S. 1 (1947), and *McCollum* v. *Board of Education*, 333 U. S. 203 (1948), *ante*, at 381–382, 390, 391, 392, but de-

*[This opinion applies also to No. 84–237, *Aguilar et al.* v. *Felton et al.*, No. 84–238, *Secretary, United States Department of Education* v. *Felton et al.*, and No. 84–239, *Chancellor of the Board of Education of the City of New York* v. *Felton et al.*, *post*, p. 402.]

clines to discuss the faulty "wall" premise upon which those cases rest. In doing so the Court blinds itself to the first 150 years' history of the Establishment Clause.

The Court today attempts to give content to the "effects" prong of the *Lemon* test by holding that a "symbolic link between government and religion" creates an impermissible effect. *Ante*, at 385. But one wonders how the teaching of "Math Topics," "Spanish," and "Gymnastics," which is struck down today, creates a greater "symbolic link" than the municipal crèche upheld in *Lynch* v. *Donnelly*, 465 U. S. 668 (1984), or the legislative chaplain upheld in *Marsh* v. *Chambers*, 463 U. S. 783 (1983).

A most unfortunate result of this case is that to support its holding the Court, despite its disclaimers, impugns the integrity of public school teachers. Contrary to the law and the teachers' promises, they are assumed to be eager inculcators of religious dogma, see *ante*, at 387–389, requiring, in the Court's words, "ongoing inspection." *Aguilar* v. *Felton*, *post*, at 412; see *ante*, at 387–389. Not one instance of attempted religious inculcation exists in the records of the school-aid cases decided today, even though both the Grand Rapids and New York programs have been in operation for a number of years. I would reverse.

AGUILAR ET AL. *v.* FELTON ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84–237. Argued December 5, 1984—Decided July 1, 1985*

New York City uses federal funds received under the Title I program of the Elementary and Secondary Education Act of 1965 to pay the salaries of public school employees who teach in parochial schools in the city. That program authorized federal financial assistance to local educational institutions to meet the needs of educationally deprived children from low-income families. The city makes the teacher assignments, and the teachers are supervised by field personnel who monitor the Title I classes. Appellee city taxpayers brought an action in Federal District Court, alleging that the Title I program administered by the city violates the Establishment Clause of the First Amendment, and seeking injunctive relief. The District Court granted appellants' motion for summary judgment based on the evidentiary record in another case that involved an identical challenge to the city's Title I program, and in which the constitutionality of the program was upheld. The Court of Appeals reversed.

Held: The Title I program administered by New York City, which is similar in a number of respects to that held unconstitutional today in *School District of Grand Rapids* v. *Ball*, *ante*, p. 373, violates the Establishment Clause. Although the program here could be argued to be distinguishable from that in *School District of Grand Rapids* on the ground that New York City has adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools, the supervision would at best assist in preventing the Title I program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school. And the program here would, in any event, inevitably result in the excessive entanglement of church and state. Even where state aid to parochial institutions does not have the primary effect of advancing religion, the provision of such aid may nevertheless violate the Establishment Clause owing to the interaction of church and state in the administration of that aid. Here, the scope

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*Together with No. 84–238, *Secretary, United States Department of Education* v. *Felton et al.*, and No. 84–239, *Chancellor of the Board of Education of the City of New York* v. *Felton et al.*, also on appeal from the same court.

and duration of New York City's Title I program would require a permanent and pervasive state presence in the sectarian schools receiving aid. This pervasive monitoring infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. Moreover, personnel of the public and parochial school systems must work together in resolving various administrative matters and problems, and the program necessitates frequent contacts between the regular parochial school teachers and the remedial teachers. Pp. 408–414.

739 F. 2d 48, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 414. BURGER, C. J., *post*, p. 419, WHITE, J., *ante*, p. 400, and REHNQUIST, J., *post*, p. 420, filed dissenting opinions. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, J., joined as to Parts II and III, *post*, p. 421.

Solicitor General Lee argued the cause for appellants in all cases. With him on the briefs for appellant in No. 84–238 were *Acting Assistant Attorney General Willard, Deputy Solicitor General Bator, Anthony J. Steinmeyer*, and *Michael Jay Singer*. *Charles H. Wilson* filed a brief for appellant in No. 84–237. *Frederick A. O. Schwarz, Jr., Leonard Koerner*, and *Stephen J. McGrath* filed briefs for appellant in No. 84–239.

Stanley Geller argued the cause and filed briefs for appellees in all cases.†

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†Briefs of *amici curiae* urging reversal were filed for the Council for American Private Education et al. by *Edward McGlynn Gaffney, Jr.*; for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell*; for Citizens for Educational Freedom by *Charles E. Rice*; for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin, Dennis Rapps*, and *Daniel D. Chazin*; for Parents Rights, Inc., by *John J. Donnelly*; and for the United States Catholic Conference by *Wilfred R. Caron* and *Mark E. Chopko*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Burt Neuborne, Charles Sims*, and *Marc D. Stern*; for Americans United for Separation of Church and State et al. by *Lee Boothby*; and for the Anti-Defamation Leaque of B'nai B'rith by *Justin J. Finger, Meyer Eisenberg*, and *Jeffrey P. Sinensky*.

JUSTICE BRENNAN delivered the opinion of the Court.

The City of New York uses federal funds to pay the salaries of public employees who teach in parochial schools. In this companion case to *School District of Grand Rapids* v. *Ball*, *ante*, p. 373, we determine whether this practice violates the Establishment Clause of the First Amendment.

I

A

The program at issue in this case, originally enacted as Title I of the Elementary and Secondary Education Act of 1965,[1] authorizes the Secretary of Education to distribute financial assistance to local educational institutions to meet the needs of educationally deprived children from low-income families. The funds are to be appropriated in accordance with programs proposed by local educational agencies and approved by state educational agencies. 20 U. S. C.

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[1] Title I, 92 Stat. 2153, was codified at 20 U. S. C. § 2701 *et seq.* Section 2701 provided:

"In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children."

Effective October 1, 1982, Title I was superseded by Chapter I of the Education Consolidation and Improvement Act of 1981, 95 Stat. 464, 20 U. S. C. § 3801 *et seq.* See 20 U. S. C. § 3801 (current Chapter I analogue of § 2701). The provisions concerning the participation of children in private schools under Chapter I are virtually identical to those in Title I. Compare 20 U. S. C. § 2740 (former Title I provision) with 20 U. S. C. § 3806 (current Chapter I provision). For the sake of convenience, we will adopt the usage of the parties and continue to refer to the program as "Title I."

§ 3805(a).[2] "To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provisions for including special educational services and arrangements . . . in which such children can participate." § 3806(a).[3] The proposed programs must also meet the following statutory requirements: the children involved in the program must be educationally deprived, § 3804(a),[4] the children must reside in areas comprising a high concentration of low-income families, § 3805(b),[5] and the programs must sup-

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[2] The statute provides:

"A local educational agency may receive a grant under this subchapter for any fiscal year if it has on file with the State educational agency an application which describes the programs and projects to be conducted with such assistance for a period of not more than three years, and such application has been approved by the State educational agency."

See also 20 U. S. C. § 2731 (former Title I analogue).

[3] In *Wheeler* v. *Barrera*, 417 U. S. 402 (1974), we addressed the question whether this provision requires the assignment of publicly employed teachers to provide instruction during regular school hours in parochial schools. We held that Title I mandated that private school students receive services comparable to, but not identical to, the Title I services received by public school students. *Id.*, at 420–421. Therefore, the statute would permit, but not require, that on-site services be provided in the parochial schools. In reaching this conclusion as a matter of statutory interpretation, we explicitly noted that "we intimate no view as to the Establishment Clause effect of any particular program." *Id.*, at 426. *Wheeler* thus provides no authority for the constitutionality of the program before us today.

[4] The statute provides:

"Each State and local educational agency shall use the payments under this subchapter for programs and projects (including the acquisition of equipment and, where necessary, the construction of school facilities) which are designed to meet the special educational needs of educationally deprived children."

[5] The statute provides:

"The application described in subsection (a) of this section shall be approved if . . . the programs and projects described—

"(1)(A) are conducted in attendance areas of such agency having the highest concentration of low-income children . . . ."

plement, not supplant, programs that would exist absent funding under Title I. § 3807(b).[6]

Since 1966, the City of New York has provided instructional services funded by Title I to parochial school students on the premises of parochial schools. Of those students eligible to receive funds in 1981–1982, 13.2% were enrolled in private schools. Of that group, 84% were enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn and 8% were enrolled in Hebrew day schools. With respect to the religious atmosphere of these schools, the Court of Appeals concluded that "the picture that emerges is of a system in which religious considerations play a key role in the selection of students and teachers, and which has as its substantial purpose the inculcation of religious values." 739 F. 2d 48, 68 (CA2 1984).

The programs conducted at these schools include remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services. These programs are carried out by regular employees of the public schools (teachers, guidance counselors, psychologists, psychiatrists, and social workers) who have volunteered to teach in the parochial schools. The amount of time that each professional spends in the parochial school is determined by the number of students in the particular program and the needs of these students.

The City's Bureau of Nonpublic School Reimbursement makes teacher assignments, and the instructors are super-

[6] The statute provides:

"A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources. In order to demonstrate compliance with this subsection a local education agency shall not be required to provide services under this subchapter outside the regular classroom or school program."

vised by field personnel, who attempt to pay at least one unannounced visit per month. The field supervisors, in turn, report to program coordinators, who also pay occasional unannounced supervisory visits to monitor Title I classes in the parochial schools. The professionals involved in the program are directed to avoid involvement with religious activities that are conducted within the private schools and to bar religious materials in their classrooms. All material and equipment used in the programs funded under Title I are supplied by the Government and are used only in those programs. The professional personnel are solely responsible for the selection of the students. Additionally, the professionals are informed that contact with private school personnel should be kept to a minimum. Finally, the administrators of the parochial schools are required to clear the classrooms used by the public school personnel of all religious symbols.

B

In 1978, six taxpayers commenced this action in the District Court for the Eastern District of New York, alleging that the Title I program administered by the City of New York violates the Establishment Clause. These taxpayers, appellees in today's case, sought to enjoin the further distribution of funds to programs involving instruction on the premises of parochial schools. Initially the case was held for the outcome of *National Coalition for Public Education and Religious Liberty* v. *Harris*, 489 F. Supp. 1248 (SDNY 1980) *(PEARL)*, which involved an identical challenge to the Title I program. When the District Court in *PEARL* affirmed the constitutionality of the Title I program, *ibid.*, and this Court dismissed the appeal for want of jurisdiction, 449 U. S. 808 (1980), the challenge of the present appellees was renewed. The District Court granted appellants' motion for summary judgment based upon the evidentiary record developed in *PEARL*.

A unanimous panel of the Court of Appeals for the Second Circuit reversed, holding that

> "[t]he Establishment Clause, as it has been interpreted by the Supreme Court in *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D. N. J. 1973), *aff'd mem.*, 417 U. S. 961 . . . (1974); *Meek v. Pittenger*, 421 U. S. 349 . . . (1975) (particularly Part V, pp. 367–72); and *Wolman v. Walter*, 433 U. S. 229 . . . (1977), constitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise, or to provide clinical and guidance services of the sort at issue here." 739 F. 2d, at 49–50.

We postponed probable jurisdiction. 469 U. S. 878 (1984). We conclude that jurisdiction by appeal does not properly lie.[7] Treating the papers as a petition for a writ of certiorari, see 28 U. S. C. § 2103, we grant the petition and now affirm the judgment below.

II

In *School District of Grand Rapids* v. *Ball*, *ante*, p. 373, the Court has today held unconstitutional under the Establishment Clause two remedial and enhancement programs operated by the Grand Rapids Public School District, in which

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[7] The Court of Appeals held that the plan adopted and administered by the City of New York violates the Establishment Clause. 739 F. 2d 48, 72 (1984). Appeals from this ruling were taken pursuant to 28 U. S. C. § 1252. An appeal under § 1252, however, may be taken only from an interlocutory or final judgment that has held an Act of Congress unconstitutional as applied ("*i. e.*, that the section, by its own terms, infringed constitutional freedoms in the circumstances of that particular case") or as a whole. *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U. S. 561, 563–565 (1972). Because the ruling appealed from is not such a judgment, the appeals must be dismissed for want of jurisdiction. *Ibid.*

As we have in comparable cases, we shall continue in this opinion to refer to the parties as appellants and appellees in order to minimize confusion. See, *e. g.*, *Kulko* v. *California Superior Court*, 436 U. S. 84, 90, n. 4 (1978).

classes were provided to private school children at public expense in classrooms located in and leased from the local private schools. The New York City programs challenged in this case are very similar to the programs we examined in *Ball*. In both cases, publicly funded instructors teach classes composed exclusively of private school students in private school buildings. In both cases, an overwhelming number of the participating private schools are religiously affiliated. In both cases, the publicly funded programs provide not only professional personnel, but also all materials and supplies necessary for the operation of the programs. Finally, the instructors in both cases are told that they are public school employees under the sole control of the public school system.

Appellants attempt to distinguish this case on the ground that the City of New York, unlike the Grand Rapids Public School District, has adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools. At best, the supervision in this case would assist in preventing the Title I program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school. But appellants' argument fails in any event, because the supervisory system established by the City of New York inevitably results in the excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine. Even where state aid to parochial institutions does not have the primary effect of advancing religion, the provision of such aid may nonetheless violate the Establishment Clause owing to the nature of the interaction of church and state in the administration of that aid.

The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the

governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters. "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum* v. *Board of Education*, 333 U. S. 203, 212 (1948).

In *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), the Court held that the supervision necessary to ensure that teachers in parochial schools were not conveying religious messages to their students would constitute the excessive entanglement of church and state:

> "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church." *Id.*, at 619.

Similarly, in *Meek* v. *Pittenger*, 421 U. S. 349 (1975), we invalidated a state program that offered, *inter alia*, guidance, testing, and remedial and therapeutic services performed by public employees on the premises of the parochial schools. *Id.*, at 352–353. As in *Lemon*, we observed that though a comprehensive system of supervision might conceivably prevent teachers from having the primary effect of advancing religion, such a system would inevitably lead to an unconstitutional administrative entanglement between church and state.

> "The prophylactic contacts required to ensure that teachers play a strictly nonideological role, the Court held [in *Lemon*], necessarily give rise to a constitution-

> ally intolerable degree of entanglement between church and state. *Id.*, at 619. The same excessive entanglement would be required for Pennsylvania to be 'certain,' as it must be, that . . . personnel do not advance the religious mission of the church-related schools in which they serve. *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29, 40–41, aff'd, 417 U. S. 961." 421 U. S., at 370.

In *Roemer* v. *Maryland Public Works Board*, 426 U. S. 736 (1976), the Court sustained state programs of aid to religiously affiliated institutions of higher learning. The State allowed the grants to be used for any nonsectarian purpose. The Court upheld the grants on the ground that the institutions were not "'pervasively sectarian,'" *id.*, at 758–759, and therefore a system of supervision was unnecessary to ensure that the grants were not being used to effect a religious end. In so holding, the Court identified "what is crucial to a nonentangling aid program: the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes." *Id.*, at 765. Similarly, in *Tilton* v. *Richardson*, 403 U. S. 672 (1971), the Court upheld one-time grants to sectarian institutions because ongoing supervision was not required. See also *Hunt* v. *McNair*, 413 U. S. 734 (1973).

As the Court of Appeals recognized, the elementary and secondary schools here are far different from the colleges at issue in *Roemer*, *Hunt*, and *Tilton*. 739 F. 2d, at 68–70. Unlike the colleges, which were found not to be "pervasively sectarian," many of the schools involved in this case are the same sectarian schools which had "'as a substantial purpose the inculcation of religious values'" in *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 768 (1973), quoting *Committee for Public Education & Religious Liberty* v. *Nyquist*, 350 F. Supp. 655, 663 (SDNY 1972). Moreover, our holding in *Meek* invalidating instructional services much like those at issue in this case rested

on the ground that the publicly funded teachers were "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Meek*, *supra*, at 371. The court below found that the schools involved in this case were "well within this characterization." 739 F. 2d, at 70.[8] Unlike the schools in *Roemer*, many of the schools here receive funds and report back to their affiliated church, require attendance at church religious exercises, begin the schoolday or class period with prayer, and grant preference in admission to members of the sponsoring denominations. 739 F. 2d, at 70. In addition, the Catholic schools at issue here, which constitute the vast majority of the aided schools, are under the general supervision and control of the local parish. *Ibid.*

The critical elements of the entanglement proscribed in *Lemon* and *Meek* are thus present in this case. First, as noted above, the aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message. Compare *Lemon*, *supra*, at 619, with *Tilton*, *supra*, at 688, and *Roemer*, *supra*, at 765. In short, the scope and duration of New York City's Title I

[8] Appellants suggest that the degree of sectarianism differs from school to school. This has little bearing on our analysis. As Judge Friendly, writing for the court below, noted: "It may well be that the degree of sectarianism in Catholic schools in, for example, black neighborhoods, with considerable proportions of non-Catholic pupils and teachers, is relatively low; by the same token, in other schools it may be relatively high. Yet . . . enforcement of the Establishment Clause does not rest on means or medians. If any significant number of the Title I schools create the risks described in *Meek*, *Meek* applies. It would be simply incredible, and the affidavits do not aver, that all, or almost all, New York City's parochial schools receiving Title I aid have . . . abandoned 'the religious mission that is the only reason for the schools' existence.'" 739 F. 2d, at 70 (quoting *Lemon* v. *Kurtzman*, 403 U. S. 602, 650 (1971) (opinion of BRENNAN, J.).

program would require a permanent and pervasive state presence in the sectarian schools receiving aid.

This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. Agents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in Title I classes. Cf. *Lemon* v. *Kurtzman*, 403 U. S., at 619 ("What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion"). In addition, the religious school must obey these same agents when they make determinations as to what is and what is not a "religious symbol" and thus off limits in a Title I classroom. In short, the religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought.

The administrative cooperation that is required to maintain the educational program at issue here entangles church and state in still another way that infringes interests at the heart of the Establishment Clause. Administrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program. Furthermore, the program necessitates "frequent contacts between the regular and the remedial teachers (or other professionals), in which each side reports on individual student needs, problems encountered, and results achieved." 739 F. 2d, at 65.

We have long recognized that underlying the Establishment Clause is "the objective . . . to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other." *Lemon* v. *Kurtzman*, *supra*, at 614.

See also *McCollum* v. *Board of Education*, 333 U. S., at 212. Although "[s]eparation in this context cannot mean absence of all contact," *Walz* v. *Tax Comm'n*, 397 U. S. 664, 676 (1970), the detailed monitoring and close administrative contact required to maintain New York City's Title I program can only produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." *Id.*, at 674. The numerous judgments that must be made by agents of the city concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase. At the same time, "[t]he picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental 'secularization of a creed.'" *Lemon* v. *Kurtzman*, *supra*, at 650 (opinion of BRENNAN, J.).

III

Despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles that they implicate—that neither the State nor Federal Government shall promote or hinder a particular faith or faith generally through the advancement of benefits or through the excessive entanglement of church and state in the administration of those benefits.

Affirmed.

[For dissenting opinion of JUSTICE WHITE, see *ante*, p. 400.]

JUSTICE POWELL, concurring.

I concur in the Court's opinions and judgments today in this case and in *School District of Grand Rapids* v. *Ball*, *ante*, p. 373, holding that the aid to parochial schools involved in those cases violates the Establishment Clause of the First

Amendment. I write to emphasize additional reasons why precedents of this Court require us to invalidate these two educational programs that concededly have "done so much good and little, if any, detectable harm." 739 F. 2d 48, 72 (CA2 1984). The Court has previously recognized the important role of parochial schools:

> "'Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools.'" *Mueller* v. *Allen*, 463 U. S. 388, 401–402 (1983) (quoting *Wolman* v. *Walter*, 433 U. S. 229, 262 (1977) (POWELL, J., concurring in part, concurring in judgment in part, and dissenting in part)).

"The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them." 433 U. S., at 262. Regrettably, however, the Title I and Grand Rapids programs do not survive the scrutiny required by our Establishment Clause cases.

I agree with the Court that in this case the Establishment Clause is violated because there is too great a risk of government entanglement in the administration of the religious schools; the same is true in *Ball*, *ante*, p. 373. As beneficial as the Title I program appears to be in accomplishing its secular goal of supplementing the education of deprived children, its elaborate structure, the participation of public school teachers, and the government surveillance required to ensure that public funds are used for secular purposes inevitably present a serious risk of excessive entanglement. Our cases have noted that "'[t]he State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion.'" *Meek* v. *Pittenger*, 421 U. S. 349, 371 (1975) (emphasis added) (quoting *Lemon* v. *Kurtzman*, 403

U. S. 602, 619 (1971)). This is true whether the subsidized teachers are religious school teachers, as in *Lemon*, or public school teachers teaching secular subjects to parochial school children at the parochial schools. Judge Friendly, writing for the unanimous Court of Appeals, agreed with this assessment of our cases. He correctly observed that the structure of the Title I program required the active and extensive surveillance that the City has provided, and, "under *Meek*, this very surveillance constitutes excessive entanglement even if it has succeeded in preventing the fostering of religion." 739 F. 2d, at 66.

This risk of entanglement is compounded by the additional risk of political divisiveness stemming from the aid to religion at issue here. I do not suggest that at this point in our history the Title I program or similar parochial aid plans could result in the establishment of a state religion. There likewise is small chance that these programs would result in significant religious or denominational control over our democratic processes. See *Wolman* v. *Walter*, *supra*, at 263 (POWELL, J., concurring in part, concurring in judgment in part, and dissenting in part). Nonetheless, there remains a considerable risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited governmental resources. As this Court has repeatedly recognized, there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of government. *E. g.*, *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 796–797 (1973); *Lemon* v. *Kurtzman*, *supra*, at 623. In States such as New York that have large and varied sectarian populations, one can be assured that politics will enter into any state decision to aid parochial schools. Public schools, as well as private schools, are under increasing financial pressure to meet real and perceived needs. Thus, any proposal to extend direct governmental

aid to parochial schools alone is likely to spark political disagreement from taxpayers who support the public schools, as well as from nonrecipient sectarian groups, who may fear that needed funds are being diverted from them. In short, aid to parochial schools of the sort at issue here potentially leads to "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Walz* v. *Tax Comm'n*, 397 U. S. 664, 694 (1970) (opinion of Harlan, J.). Although the Court's opinion does not discuss it at length, see *ante*, at 413, the potential for such divisiveness is a strong additional reason for holding that the Title I and Grand Rapids programs are invalid on entanglement grounds.

The Title I program at issue in this case also would be invalid under the "effects" prong of the test adopted in *Lemon* v. *Kurtzman*, *supra*.* As has been discussed thoroughly in *Ball*, *ante*, at 392–397, with respect to the Grand Rapids programs, the type of aid provided in New York by the Title I program amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require. This is not the type of "indirect and incidental effect beneficial to [the] religious institutions" that we suggested in *Nyquist* would survive Establishment Clause scrutiny. 413 U. S., at 775. Rather, by directly assuming part of the parochial schools' education function, the effect of the Title I aid is "inevitably . . . to subsidize and advance the religious mission of [the] sectarian schools," *id.*, at 779–780, even though the program provides that only secular subjects will

*Nothing that I say here should be construed as suggesting that a court inevitably must determine whether all three prongs of the *Lemon* test have been violated. See, *e. g.*, *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 794 (1973). I discuss an additional infirmity of the programs at issue in these cases only to emphasize why even a beneficial program may be invalid because of the way it is structured.

be taught. As in *Meek* v. *Pittenger*, 421 U. S. 349 (1975), the secular education these schools provide goes "'hand in hand'" with the religious mission that is the reason for the schools' existence. 421 U. S., at 366 (quoting *Lemon* v. *Kurtzman*, 403 U. S., at 657 (opinion of BRENNAN, J.)). Because of the predominantly religious nature of the schools, the substantial aid provided by the Title I program "inescapably results in the direct and substantial advancement of religious activity." *Meek* v. *Pittenger*, *supra*, at 366.

I recognize the difficult dilemma in which governments are placed by the interaction of the "effects" and entanglement prongs of the *Lemon* test. Our decisions require governments extending aid to parochial schools to tread an extremely narrow line between being certain that the "principal or primary effect" of the aid is not to advance religion, *Lemon* v. *Kurtzman*, *supra*, at 612, and avoiding excessive entanglement. Nonetheless, the Court has never foreclosed the possibility that some types of aid to parochial schools could be valid under the Establishment Clause. *Mueller* v. *Allen*, 463 U. S., at 393. Our cases have upheld evenhanded secular assistance to both parochial and public school children in some areas. *E. g.*, *ibid.* (tax deductions for educational expenses); *Board of Education* v. *Allen*, 392 U. S. 236 (1968) (provision of secular textbooks); *Everson* v. *Board of Education*, 330 U. S. 1 (1947) (reimbursements for bus fare to school). I do not read the Court's opinion as precluding these types of indirect aid to parochial schools. In the cases cited, the assistance programs made funds available equally to public and nonpublic schools without entanglement. The constitutional defect in the Title I program, as indicated above, is that it provides a direct financial subsidy to be administered in significant part by public school teachers within parochial schools—resulting in both the advancement of religion and forbidden entanglement. If, for example, Congress could fashion a program of evenhanded financial assistance to both public and private schools that could

be administered, without governmental supervision in the private schools, so as to prevent the diversion of the aid from secular purposes, we would be presented with a different question.

I join the opinions and judgments of the Court.

CHIEF JUSTICE BURGER, dissenting.

Under the guise of protecting Americans from the evils of an Established Church such as those of the 18th century and earlier times, today's decision will deny countless schoolchildren desperately needed remedial teaching services funded under Title I. The program at issue covers remedial reading, reading skills, remedial mathematics, English as a second language, and assistance for children needing special help in the learning process. The "remedial reading" portion of this program, for example, reaches children who suffer from dyslexia, a disease known to be difficult to diagnose and treat. Many of these children now will not receive the special training they need, simply because their parents desire that they attend religiously affiliated schools.

What is disconcerting about the result reached today is that, in the face of the human cost entailed by this decision, the Court does not even attempt to identify any threat to religious liberty posed by the operation of Title I. I share JUSTICE WHITE's concern that the Court's obsession with the criteria identified in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), has led to results that are "contrary to the long-range interests of the country," *ante*, at 400. As I wrote in *Wallace* v. *Jaffree*, 472 U. S. 38, 89 (1985) (dissenting opinion), "our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion." Federal programs designed to prevent a generation of children from growing up without being able to read effectively are not remotely steps in that direction. It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of

Rome lurking behind programs that are just as vital to the Nation's schoolchildren as textbooks, see generally *Board of Education* v. *Allen*, 392 U. S. 236 (1968), transportation to and from school, see generally *Everson* v. *Board of Education*, 330 U. S. 1 (1947), and school nursing services.

On the merits of this case, I dissent for the reasons stated in my separate opinion in *Meek* v. *Pittenger*, 421 U. S. 349 (1975). We have frequently recognized that some interaction between church and state is unavoidable, and that an attempt to eliminate all contact between the two would be both futile and undesirable. Justice Douglas, writing for the Court in *Zorach* v. *Clauson*, 343 U. S. 306, 312 (1952), stated:

> "The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. . . . Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly."

The Court today fails to demonstrate how the interaction occasioned by the program at issue presents any threat to the values underlying the Establishment Clause.

I cannot join in striking down a program that, in the words of the Court of Appeals, "has done so much good and little, if any, detectable harm." 739 F. 2d 48, 72 (CA2 1984). The notion that denying these services to students in religious schools is a neutral act to protect us from an Established Church has no support in logic, experience, or history. Rather than showing the neutrality the Court boasts of, it exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools.

JUSTICE REHNQUIST, dissenting.

I dissent for the reasons stated in my dissenting opinion in *Wallace* v. *Jaffree*, 472 U. S. 38, 91 (1985). In this case the Court takes advantage of the "Catch-22" paradox of its own creation, see *Wallace*, *supra*, at 109–110 (REHNQUIST, J.,

dissenting), whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement. The Court today strikes down nondiscriminatory nonsectarian aid to educationally deprived children from low-income families. The Establishment Clause does not prohibit such sorely needed assistance; we have indeed traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need. I would reverse.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins as to Parts II and III, dissenting.

Today the Court affirms the holding of the Court of Appeals that public school teachers can offer remedial instruction to disadvantaged students who attend religious schools "only if such instruction . . . [is] afforded at a neutral site off the premises of the religious school." 739 F. 2d 48, 64 (CA2 1984). This holding rests on the theory, enunciated in Part V of the Court's opinion in *Meek* v. *Pittenger*, 421 U. S. 349, 367–373 (1975), that public school teachers who set foot on parochial school premises are likely to bring religion into their classes, and that the supervision necessary to prevent religious teaching would unduly entangle church and state. Even if this theory were valid in the abstract, it cannot validly be applied to New York City's 19-year-old Title I program. The Court greatly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion, and thereby demonstrates the flaws of a test that condemns benign cooperation between church and state. I would uphold Congress' efforts to afford remedial instruction to disadvantaged schoolchildren in both public and parochial schools.

I

As in *Wallace* v. *Jaffree*, 472 U. S. 38 (1985), and *Thornton* v. *Caldor, Inc.*, 472 U. S. 703 (1985), the Court in this litigation adheres to the three-part Establishment Clause

test enunciated in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971). To survive the *Lemon* test, a statute must have both a secular legislative purpose and a principal or primary effect that neither advances nor inhibits religion. Under *Lemon* and its progeny, direct state aid to parochial schools that has the purpose or effect of furthering the religious mission of the schools is unconstitutional. I agree with that principle. According to the Court, however, the New York City Title I program is defective not because of any improper purpose or effect, but rather because it fails the third part of the *Lemon* test: the Title I program allegedly fosters excessive government entanglement with religion. I disagree with the Court's analysis of entanglement, and I question the utility of entanglement as a separate Establishment Clause standard in most cases. Before discussing entanglement, however, it is worthwhile to explore the purpose and effect of the New York City Title I program in greater depth than does the majority opinion.

The purpose of Title I is to provide special educational assistance to disadvantaged children who would not otherwise receive it. Congress recognized that poor academic performance by disadvantaged children is part of the cycle of poverty. S. Rep. No. 146, 89th Cong., 1st Sess., 4 (1965). Congress sought to break the cycle by providing classes in remedial reading, mathematics, and English to disadvantaged children in parochial as well as public schools, for public schools enjoy no monopoly on education in low-income areas. *Wheeler* v. *Barrera*, 417 U. S. 402, 405–406 (1974). See 20 U. S. C. §§2740(a), 3806(a). Congress permitted remedial instruction by public school teachers on parochial school premises only if such instruction is "not normally provided by the nonpublic school" and would "contribute particularly to meeting the special educational needs of educationally deprived children." S. Rep. No. 146, *supra*, at 12. See 34 CFR §200.73 (1984) (Department of Education regulations implementing Title I and precluding instruction on parochial

school premises except where necessary and where such instruction is not normally provided by the school).

After reviewing the text of the statute and its legislative history, the District Court concluded that Title I serves a secular purpose of aiding needy children regardless of where they attend school. App. to Juris. Statement in No. 84–238, p. 56a, incorporating findings of the District Court in *National Coalition for Public Education and Religious Liberty* v. *Harris*, 489 F. Supp. 1248, 1258 (SDNY 1980) *(PEARL)*. The Court of Appeals did not dispute this finding, and no party in this Court contends that the purpose of the statute or of the New York City Title I program is to advance or endorse religion. Indeed, the record demonstrates that New York City public school teachers offer Title I classes on the premises of parochial schools solely because alternative means to reach the disadvantaged parochial school students—such as instruction for parochial school students at the nearest public school, either after or during regular school hours—were unsuccessful. *PEARL*, *supra*, at 1255. As the Court of Appeals acknowledged, New York City "could reasonably have regarded [Title I instruction on parochial school premises] as the most effective way to carry out the purposes of the Act." 739 F. 2d, at 49. Whether one looks to the face of the statute or to its implementation, the Title I program is undeniably animated by a legitimate secular purpose.

The Court's discussion of the effect of the New York City Title I program is even more perfunctory than its analysis of the program's purpose. The Court's opinion today in *School District of Grand Rapids* v. *Ball*, *ante*, p. 373, which strikes down a Grand Rapids scheme that the Court asserts is very similar to the New York City program, identifies three ways in which public instruction on parochial school premises may have the impermissible effect of advancing religion. First, "state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may

subtly or overtly indoctrinate the students in particular religious tenets at public expense." Second, "state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public." Third, "the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." *Ante*, at 397. While addressing the effect of the Grand Rapids program at such length, the Court overlooks the effect of Title I in New York City.

One need not delve too deeply in the record to understand why the Court does not belabor the effect of the Title I program. The abstract theories explaining why on-premises instruction might possibly advance religion dissolve in the face of experience in New York City. As the District Court found in 1980:

> "New York City has been providing Title I services in nonpublic schools for fourteen years. The evidence presented in this action includes: extensive background information on Title I; an in-depth description of New York City's program; a detailed review of Title I rules and regulations and the ways in which they are enforced; and the testimony and affidavits of federal officials, state officers, school administrators, Title I teachers and supervisors, and parents of children receiving Title I services. The evidence establishes that the result feared in other cases has not materialized in the City's Title I program. The presumption—that the 'religious mission' will be advanced by providing educational services on parochial school premises—is not supported by the facts of this case." *PEARL, supra*, at 1265.

Indeed, in 19 years there has never been a single incident in which a Title I instructor "subtly or overtly" attempted to "indoctrinate the students in particular religious tenets at public expense." *Grand Rapids, ante*, at 397.

Common sense suggests a plausible explanation for this unblemished record. New York City's public Title I instructors are professional educators who can and do follow instructions not to inculcate religion in their classes. They are unlikely to be influenced by the sectarian nature of the parochial schools where they teach, not only because they are carefully supervised by public officials, but also because the vast majority of them visit several different schools each week and are not of the same religion as their parochial students.* In light of the ample record, an objective observer of the implementation of the Title I program in New York City would hardly view it as endorsing the tenets of the participating parochial schools. To the contrary, the actual and perceived effect of the program is precisely the effect intended by Congress: impoverished schoolchildren are being helped to overcome learning deficits, improving their test scores, and receiving a significant boost in their struggle to obtain both a thorough education and the opportunities that flow from it.

The only type of impermissible effect that arguably could carry over from the *Grand Rapids* decision to this litigation, then, is the effect of subsidizing "the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." *Ibid.* That effect is tenuous, however, in light of the statutory directive that Title I funds may be used only to provide services that otherwise would not be available to the participating students. 20 U. S. C. §3807(b). The Secretary of Education has vigorously enforced the requirement that Title I funds supplement rather than supplant the services of local education agencies. See *Bennett* v. *Kentucky Dept. of Ed.*, 470 U. S. 656 (1985); *Bennett* v. *New Jersey*, 470 U. S. 632 (1985).

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*It is undisputed that 78% of Title I instructors who teach in parochial schools visit more than one school each week. Almost three-quarters of the instructors do not share the religious affiliation of any school they teach in. App. 49.

Even if we were to assume that Title I remedial classes in New York City may have duplicated to some extent instruction parochial schools would have offered in the absence of Title I, the Court's delineation of this third type of effect proscribed by the Establishment Clause would be seriously flawed. Our Establishment Clause decisions have not barred remedial assistance to parochial school children, but rather remedial assistance *on the premises of the parochial school.* Under *Wolman* v. *Walter*, 433 U. S. 229, 244–248 (1977), the New York City classes prohibited by the Court today would have survived Establishment Clause scrutiny if they had been offered in a neutral setting off the property of the private school. Yet it is difficult to understand why a remedial reading class offered on parochial school premises is any more likely to supplant the secular course offerings of the parochial school than the same class offered in a portable classroom next door to the school. Unless *Wolman* was wrongly decided, the defect in the Title I program cannot lie in the risk that it will supplant secular course offerings.

II

Recognizing the weakness of any claim of an improper purpose or effect, the Court today relies entirely on the entanglement prong of *Lemon* to invalidate the New York City Title I program. The Court holds that the occasional presence of peripatetic public school teachers on parochial school grounds threatens undue entanglement of church and state because (1) the remedial instruction is afforded in a pervasively sectarian environment; (2) ongoing supervision is required to assure that the public school teachers do not attempt to inculcate religion; (3) the administrative personnel of the parochial and public school systems must work together in resolving administrative and scheduling problems; and (4) the instruction is likely to result in political divisiveness over the propriety of direct aid. *Ante*, at 412–414; *ante*, at 415–416 (concurring opinion of POWELL, J.).

This analysis of entanglement, I acknowledge, finds support in some of this Court's precedents. In *Meek* v. *Pittenger*, 421 U. S., at 369, the Court asserted that it could not rely "on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." Because "a teacher remains a teacher," the Court stated, there remains a risk that teachers will intertwine religious doctrine with secular instruction. The continuing state surveillance necessary to prevent this from occurring would produce undue entanglement of church and state. *Id.*, at 370–372. The Court's opinion in *Meek* further asserted that public instruction on parochial school premises creates a serious risk of divisive political conflict over the issue of aid to religion. *Ibid.* *Meek*'s analysis of entanglement was reaffirmed in *Wolman* two Terms later.

I would accord these decisions the appropriate deference commanded by the doctrine of *stare decisis* if I could discern logical support for their analysis. But experience has demonstrated that the analysis in Part V of the *Meek* opinion is flawed. At the time *Meek* was decided, thoughtful dissents pointed out the absence of any record support for the notion that public school teachers would attempt to inculcate religion simply because they temporarily occupied a parochial school classroom, or that such instruction would produce political divisiveness. *Id.*, at 385 (opinion of BURGER, C. J.); *id.*, at 387 (opinion of REHNQUIST, J.). Experience has given greater force to the arguments of the dissenting opinions in *Meek*. It is not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school. *Meek* is correct in asserting that a teacher of remedial reading "remains a teacher," but surely it is significant that the teacher involved is a professional, full-time public school employee who is unaccustomed to bringing religion into the classroom.

Given that not a single incident of religious indoctrination has been identified as occurring in the thousands of classes offered in Grand Rapids and New York City over the past two decades, it is time to acknowledge that the risk identified in *Meek* was greatly exaggerated.

Just as the risk that public school teachers in parochial classrooms will inculcate religion has been exaggerated, so has the degree of supervision required to manage that risk. In this respect the New York City Title I progam is instructive. What supervision has been necessary in New York City to enable public school teachers to help disadvantaged children for 19 years without once proselytizing? Public officials have prepared careful instructions warning public school teachers of their exclusively secular mission, and have required Title I teachers to study and observe them. App. 50–51. Under the rules, Title I teachers are not accountable to parochial or private school officials; they have sole responsibility for selecting the students who participate in their class, must administer their own tests for determining eligibility, cannot engage in team teaching or cooperative activities with parochial school teachers, must make sure that all materials and equipment they use are not otherwise used by the parochial school, and must not participate in religious activities in the schools or introduce any religious matter into their teaching. To ensure compliance with the rules, a field supervisor and a program coordinator, who are full-time public school employees, make unannounced visits to each teacher's classroom at least once a month. *Id.*, at 53.

The Court concludes that this degree of supervision of public school employees by other public school employees constitutes excessive entanglement of church and state. I cannot agree. The supervision that occurs in New York City's Title I program does not differ significantly from the supervision any public school teacher receives, regardless of the location of the classroom. JUSTICE POWELL suggests that the required supervision is extensive because the State must be

certain that public school teachers do not inculcate religion. *Ante*, at 415. That reasoning would require us to close our public schools, for there is always some chance that a public school teacher will bring religion into the classroom, regardless of its location. See *Wallace* v. *Jaffree*, 472 U. S., at 44–45, n. 23. Even if I remained confident of the usefulness of entanglement as an Establishment Clause test, I would conclude that New York City's efforts to prevent religious indoctrination in Title I classes have been adequate and have not caused excessive institutional entanglement of church and state.

The Court's reliance on the potential for political divisiveness as evidence of undue entanglement is also unpersuasive. There is little record support for the proposition that New York City's admirable Title I program has ignited any controversy other than this litigation. In *Mueller* v. *Allen*, 463 U. S. 388, 403–404, n. 11 (1983), the Court cautioned that the "elusive inquiry" into political divisiveness should be confined to a narrow category of parochial aid cases. The concurring opinion in *Lynch* v. *Donnelly*, 465 U. S. 668, 687 (1984), went further, suggesting that Establishment Clause analysis should focus solely on the character of the government activity that might cause political divisiveness, and that "the entanglement prong of the *Lemon* test is properly limited to institutional entanglement."

I adhere to the doubts about the entanglement test that were expressed in *Lynch*. It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit. My reservations about the entanglement test, however, have come to encompass its institutional aspects as well. As JUSTICE REHNQUIST has pointed out, many of the inconsistencies in our Establishment Clause decisions can be ascribed to our insistence that parochial aid programs with a valid purpose and effect may still be invalid by virtue of undue entanglement. *Wallace* v.

Jaffree, *supra*, at 109–110. For example, we permit a State to pay for bus transportation to a parochial school, *Everson* v. *Board of Education*, 330 U. S. 1 (1947), but preclude States from providing buses for parochial school field trips, on the theory such trips involve excessive state supervision of the parochial officials who lead them. *Wolman*, 433 U. S., at 254. To a great extent, the anomalous results in our Establishment Clause cases are "attributable to [the] 'entanglement' prong." Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673, 681 (1980).

Pervasive institutional involvement of church and state may remain relevant in deciding the *effect* of a statute which is alleged to violate the Establishment Clause, *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970), but state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute. The State requires sectarian organizations to cooperate on a whole range of matters without thereby advancing religion or giving the impression that the government endorses religion. *Wallace* v. *Jaffree*, *supra*, at 110 (dissenting opinion of REHNQUIST, J.) (noting that state educational agencies impose myriad curriculum, attendance, certification, fire, and safety regulations on sectarian schools). If a statute lacks a purpose or effect of advancing or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion.

III

Today's ruling does not spell the end of the Title I program of remedial education for disadvantaged children. Children attending public schools may still obtain the benefits of the program. Impoverished children who attend parochial schools may also continue to benefit from Title I programs offered off the premises of their schools—possibly in portable

classrooms just over the edge of school property. The only disadvantaged children who lose under the Court's holding are those in cities where it is not economically and logistically feasible to provide public facilities for remedial education adjacent to the parochial school. But this subset is significant, for it includes more than 20,000 New York City schoolchildren and uncounted others elsewhere in the country.

For these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers (most of whom are of different faiths than their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school. I reject this theory and the analysis in *Meek* v. *Pittenger* on which it is based. I cannot close my eyes to the fact that, over almost two decades, New York City's public school teachers have helped thousands of impoverished parochial school children to overcome educational disadvantages without once attempting to inculcate religion. Their praiseworthy efforts have not eroded and do not threaten the religious liberty assured by the Establishment Clause. The contrary judgment of the Court of Appeals should be reversed.

I respectfully dissent.

CITY OF CLEBURNE, TEXAS, ET AL. *v.* CLEBURNE LIVING CENTER, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84–468. Argued March 18, 1985—Reargued April 23, 1985—Decided July 1, 1985

Respondent Cleburne Living Center, Inc. (CLC), which anticipated leasing a certain building for the operation of a group home for the mentally retarded, was informed by petitioner city that a special use permit would be required, the city having concluded that the proposed group home should be classified as a "hospital for the feebleminded" under the zoning ordinance covering the area in which the proposed home would be located. Accordingly, CLC applied for a special use permit, but the City Council, after a public hearing, denied the permit. CLC and others (also respondents here) then filed suit against the city and a number of its officials, alleging that the zoning ordinance, on its face and as applied, violated the equal protection rights of CLC and its potential residents. The District Court held the ordinance and its application constitutional. The Court of Appeals reversed, holding that mental retardation is a "quasi-suspect" classification; that, under the applicable "heightened-scrutiny" equal protection test, the ordinance was facially invalid because it did not substantially further an important governmental purpose; and that the ordinance was also invalid as applied.

Held:

1. The Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. Pp. 439–447.

(a) Where individuals in a group affected by a statute have distinguishing characteristics relevant to interests a State has the authority to implement, the Equal Protection Clause requires only that the classification drawn by the statute be rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude. Pp. 439–442.

(b) Mentally retarded persons, who have a reduced ability to cope with and function in the everyday world, are thus different from other persons, and the States' interest in dealing with and providing for them

is plainly a legitimate one. The distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary than is afforded under the normal equal protection standard. Moreover, the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. The equal protection standard requiring that legislation be rationally related to a legitimate governmental purpose affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. Pp. 442–447.

2. Requiring a special use permit for the proposed group home here deprives respondents of the equal protection of the laws, and thus it is unnecessary to decide whether the ordinance's permit requirement is facially invalid where the mentally retarded are involved. Although the mentally retarded, as a group, are different from those who occupy other facilities—such as boarding houses and hospitals—that are permitted in the zoning area in question without a special permit, such difference is irrelevant unless the proposed group home would threaten the city's legitimate interests in a way that the permitted uses would not. The record does not reveal any rational basis for believing that the proposed group home would pose any special threat to the city's legitimate interests. Requiring the permit in this case appears to rest on an irrational prejudice against the mentally retarded, including those who would occupy the proposed group home and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law. Pp. 447–450.

726 F. 2d 191, affirmed in part, vacated in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. STEVENS, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 451. MARSHALL, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 455.

Earl Luna reargued the cause for petitioners. With him on the briefs were *Robert T. Miller, Jr.*, and *Mary Milford.*

Renea Hicks reargued the cause for respondents. With him on the brief were *Diane Shisk* and *Caryl Oberman.**

**Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Solicitor General Fried, Deputy Assistant Attorney General Cooper,* and *Walter W. Barnett* filed a brief for the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Connecticut et al. by *Joseph I. Lieberman*, Attorney General of Connecticut, *Elliot F. Gerson*, Deputy Attorney General, and *Henry S. Cohn*, Assistant Attorney General, *John Steven Clark*, Attorney General of Arkansas, *John K. Van de Kamp*, Attorney General of California, *Duane Woodard*, Attorney General of Colorado, *Neil F. Hartigan*, Attorney General of Illinois, *Jill Wine-Banks*, Solicitor General, and *Robert J. Connor*, Special Assistant Attorney General, *William J. Guste, Jr.*, Attorney General of Louisiana, and *Robert A. Barnett*, Assistant Attorney General, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Arlene Violet*, Attorney General of Rhode Island, *W. J. Michael Cody*, Attorney General of Tennessee, and *Charles G. Brown*, Attorney General of West Virginia; for the State of Maryland by *Stephen H. Sachs*, Attorney General, *Dennis M. Sweeney*, Deputy Attorney General, and *Judith K. Sykes*, Assistant Attorney General; for the State of Pennsylvania et al. by *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Allen C. Warshaw*, Chief Deputy Attorney General, and *Andrew S. Gordon*, Senior Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Thomas J. Miller* of Iowa, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Stephen E. Merrill* of New Hampshire, *Irwin I. Kimmelman* of New Jersey, *Anthony J. Celebrezze, Jr.*, of Ohio, and *Bronson C. La Follette* of Wisconsin; for the State of Texas et al. by *Jim Mattox*, Attorney General of Texas, *David R. Richards*, *J. Patrick Wiseman*, and *James C. Todd* and *Philip Durst*, Assistant Attorneys General; for the American Association on Mental Deficiency et al. by *James W. Ellis*, *Ruth A. Luckasson*, *Stanley S. Herr*, and *Donald N. Bersoff;* for the American Civil Liberties Union Foundation et al. by *Burt Neuborne*, *Charles S. Sims*, *Robert M. Levy*, *Paul Hoffman*, *Stanley Fleishman*, *Joseph Lawrence*, *James Preis*, and *James C. Harrington;* for the Association for Retarded Citizens/USA et al. by *Thomas K. Gilhool*, *Frank J. Laski*, *Michael Churchill*, and *Timothy M. Cook;* for the Disability Rights Education and Defense Fund by *Arlene Brynne Mayerson;* for Disabled Peoples' International and Human Rights Advocates, Inc., by *Karen*

JUSTICE WHITE delivered the opinion of the Court.

A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes. The Court of Appeals for the Fifth Circuit held that mental retardation is a "quasi-suspect" classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose. We hold that a lesser standard of scrutiny is appropriate, but conclude that under that standard the ordinance is invalid as applied in this case.

I

In July 1980, respondent Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intention of leasing it to Cleburne Living Center, Inc. (CLC),[1] for the operation of a group home for the mentally retarded. It was anticipated that the home would house 13 retarded men and women, who would be under the constant supervision of CLC staff members. The house had four bedrooms and two baths, with a half bath to be added. CLC planned to comply with all applicable state and federal regulations.[2]

Parker; and for the National Conference of Catholic Charities et al. by *Lewis Golinker, Herbert Semmel,* and *Kathleen E. Surgalla.*

Elliott W. Atkinson, Jr., filed a brief for the Federation of Greater Baton Rouge Civic Associations, Inc., as *amicus curiae.*

[1] Cleburne Living Center, Inc., is now known as Community Living Concepts, Inc. Hannah is the vice president and part owner of CLC. For convenience, both Hannah and CLC will be referred to as "CLC." A third respondent is Advocacy, Inc., a nonprofit corporation that provides legal services to developmentally disabled persons.

[2] It was anticipated that the home would be operated as a private Level I Intermediate Care Facility for the Mentally Retarded, or ICF–MR, under a program providing for joint federal-state reimbursement for residential services for mentally retarded clients. See 42 U. S. C. § 1396d(a)(15);

The city informed CLC that a special use permit would be required for the operation of a group home at the site, and CLC accordingly submitted a permit application. In response to a subsequent inquiry from CLC, the city explained that under the zoning regulations applicable to the site, a special use permit, renewable annually, was required for the construction of "[h]ospitals for the insane or feeble-minded, or alcoholic *[sic]* or drug addicts, or penal or correctional institutions."[3] The city had determined that the proposed

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Tex. Human Resources Code Ann. § 32.001 *et seq.* (1980 and Supp. 1985). ICF–MR's are covered by extensive regulations and guidelines established by the United States Department of Health and Human Services and the Texas Departments of Human Resources, Mental Health and Mental Retardation, and Health. See App. 92. See also 42 CFR § 442.1 *et seq.* (1984); 40 Tex. Adm. Code § 27.101 *et seq.* (1981).

[3] The site of the home is in an area zoned "R–3," an "Apartment House District." App. 51. Section 8 of the Cleburne zoning ordinance, in pertinent part, allows the following uses in an R–3 district:

"1. Any use permitted in District R–2.
"2. Apartment houses, or multiple dwellings.
"3. Boarding and lodging houses.
"4. Fraternity or sorority houses and dormitories.
"5. Apartment hotels.
"6. Hospitals, sanitariums, nursing homes or homes for convalescents or aged, *other than for the* insane or *feeble-minded* or alcoholics or drug addicts."
"7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
"8. Philanthropic or eleemosynary institutions, other than penal institutions.
"9. Accessory uses customarily incident to any of the above uses . . . ." *Id.*, at 60–61 (emphasis added).

Section 16 of the ordinance specifies the uses for which a special use permit is required. These include "[h]ospitals for the insane or feeble-minded, or alcoholic *[sic]* or drug addicts, or penal or correctional institutions." *Id.*, at 63. Section 16 provides that a permit for such a use may be issued by "the Governing Body, after public hearing, and after recommendation of the Planning Commission." All special use permits are limited to one year, and each applicant is required "to obtain the signatures of the property owners within two hundred (200) feet of the property to be used." *Ibid.*

group home should be classified as a "hospital for the feebleminded." After holding a public hearing on CLC's application, the City Council voted 3 to 1 to deny a special use permit.[4]

CLC then filed suit in Federal District Court against the city and a number of its officials, alleging, *inter alia*, that the zoning ordinance was invalid on its face and as applied because it discriminated against the mentally retarded in violation of the equal protection rights of CLC and its potential residents. The District Court found that "[i]f the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance," and that the City Council's decision "was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded." App. 93, 94. Even so, the District Court held the ordinance and its application constitutional. Concluding that no fundamental right was implicated and that mental retardation was neither a suspect nor a quasi-suspect classification, the court employed the minimum level of judicial scrutiny applicable to equal protection claims. The court deemed the ordinance, as written and applied, to be rationally related to the city's legitimate interests in "the legal responsibility of CLC and its residents, . . . the safety and fears of residents in the adjoining neighborhood," and the number of people to be housed in the home.[5] *Id.*, at 103.

The Court of Appeals for the Fifth Circuit reversed, determining that mental retardation was a quasi-suspect classification and that it should assess the validity of the ordinance

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[4] The city's Planning and Zoning Commission had earlier held a hearing and voted to deny the permit. *Id.*, at 91.

[5] The District Court also rejected CLC's other claims, including the argument that the city had violated due process by improperly delegating its zoning powers to the owners of adjoining property. App. 105. Cf. *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116 (1928). The Court of Appeals did not address this argument, and it has not been raised by the parties in this Court.

under intermediate-level scrutiny. 726 F. 2d 191 (1984). Because mental retardation was in fact relevant to many legislative actions, strict scrutiny was not appropriate. But in light of the history of "unfair and often grotesque mistreatment" of the retarded, discrimination against them was "likely to reflect deep-seated prejudice." *Id.*, at 197. In addition, the mentally retarded lacked political power, and their condition was immutable. The court considered heightened scrutiny to be particularly appropriate in this case, because the city's ordinance withheld a benefit which, although not fundamental, was very important to the mentally retarded. Without group homes, the court stated, the retarded could never hope to integrate themselves into the community.[6] Applying the test that it considered appropriate, the court held that the ordinance was invalid on its face because it did not substantially further any important governmental interests. The Court of Appeals went on to hold that the ordinance was also invalid as applied.[7] Rehearing en banc was

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[6] The District Court had found:

"Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community." App. 94.

[7] The city relied on a recently passed state regulation limiting group homes to 6 residents in support of its argument that the CLC home would be overcrowded with 13. But, the Court of Appeals observed, the city had failed to justify its apparent view that any other group of 13 people could live under these allegedly "crowded" conditions, nor had it explained why 6 would be acceptable but 13 not.

CLC concedes that it could not qualify for certification under the new Texas regulation. Tr. of Oral Rearg. 31. The Court of Appeals stated that the new regulation applied only to applications made after May 1, 1982, and therefore did not apply to the CLC home. 726 F. 2d, at 202. The regulation itself contains no grandfather clause, see App. 78–81, and the District Court made no specific finding on this point. See *id.*, at 96. However, the State has asserted in an *amici* brief filed in this Court that "'the six bed rule' would not pose an obstacle to the proposed Featherston

denied with six judges dissenting in an opinion urging en banc consideration of the panel's adoption of a heightened standard of review. We granted certiorari, 469 U. S. 1016 (1984).[8]

II

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler* v. *Doe*, 457 U. S. 202, 216 (1982). Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for

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Street group home at issue in this case." Brief for State of Texas et al. as *Amici Curiae* 15, n. 7. If the six-bed requirement were to apply to the home, there is a serious possibility that CLC would no longer be interested in injunctive relief. David Southern, an officer of CLC, testified that "to break even on a facility of this type, you have to have at least ten or eleven residents." App. 32. However, because CLC requested damages as well as an injunction, see *id.*, at 15, the case would not be moot.

After oral argument, the city brought to our attention the recent enactment of a Texas statute, effective September 1, 1985, providing that "family homes" are permitted uses in "all residential zones or districts in this state." The statute defines a "family home" as a community-based residence housing no more than six disabled persons, including the mentally retarded, along with two supervisory personnel. The statute does not appear to affect the city's actions with regard to group homes that plan to house more than six residents. The enactment of this legislation therefore does not affect our disposition of this case.

[8] *Macon Assn. for Retarded Citizens* v. *Macon-Bibb County Planning and Zoning Comm'n*, 252 Ga. 484, 314 S. E. 2d 218 (1984), dism'd for want of a substantial federal question, 469 U. S. 802 (1984), has no controlling effect on this case. *Macon Assn. for Retarded Citizens* involved an ordinance that had the effect of excluding a group home for the retarded only because it restricted dwelling units to those occupied by a single family, defined as no more than four unrelated persons. In *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974), we upheld the constitutionality of a similar ordinance, and the Georgia Supreme Court in *Macon Assn.* specifically held that the ordinance did not discriminate against the retarded. 252 Ga., at 487, 314 S. E. 2d, at 221.

determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Schweiker* v. *Wilson*, 450 U. S. 221, 230 (1981); *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 174–175 (1980); *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979); *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976). When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, *United States Railroad Retirement Board* v. *Fritz*, *supra*, at 174; *New Orleans* v. *Dukes*, *supra*, at 303, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964); *Graham* v. *Richardson*, 403 U. S. 365 (1971). Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution. *Kramer* v. *Union Free School District No. 15*, 395 U. S. 621 (1969); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942).

Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic

frequently bears no relation to ability to perform or contribute to society." *Frontiero* v. *Richardson*, 411 U. S. 677, 686 (1973) (plurality opinion). Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest. *Mississippi University for Women* v. *Hogan*, 458 U. S. 718 (1982); *Craig* v. *Boren*, 429 U. S. 190 (1976). Because illegitimacy is beyond the individual's control and bears "no relation to the individual's ability to participate in and contribute to society," *Mathews* v. *Lucas*, 427 U. S. 495, 505 (1976), official discriminations resting on that characteristic are also subject to somewhat heightened review. Those restrictions "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." *Mills* v. *Habluetzel*, 456 U. S. 91, 99 (1982).

We have declined, however, to extend heightened review to differential treatment based on age:

> "While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 313 (1976).

The lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be

pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

III

Against this background, we conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. First, it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for.[9] They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one.[10] How this large and diversified group is to be treated

[9] Mentally retarded individuals fall into four distinct categories. The vast majority—approximately 89%—are classified as "mildly" retarded, meaning that their IQ is between 50 and 70. Approximately 6% are "moderately" retarded, with IQs between 35 and 50. The remaining two categories are "severe" (IQs of 20 to 35) and "profound" (IQs below 20). These last two categories together account for about 5% of the mentally retarded population. App. 39 (testimony of Dr. Philip Roos).

Mental retardation is not defined by reference to intelligence or IQ alone, however. The American Association on Mental Deficiency (AAMD) has defined mental retardation as "'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.'" Brief for AAMD et al. as *Amici Curiae* 3 (quoting AAMD, Classification in Mental Retardation 1 (H. Grossman ed. 1983)). "Deficits in adaptive behavior" are limitations on general ability to meet the standards of maturation, learning, personal independence, and social responsibility expected for an individual's age level and cultural group. Brief for AAMD et al. as *Amici Curiae* 4, n. 1. Mental retardation is caused by a variety of factors, some genetic, some environmental, and some unknown. *Id.*, at 4.

[10] As Dean Ely has observed:

"Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that

under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.

Second, the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary. Thus, the Federal Government has not only outlawed discrimination against the mentally retarded in federally funded programs, see § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794, but it has also provided the retarded with the right to receive "appropriate treatment, services, and habilitation" in a setting that is "least restrictive of [their] personal liberty." Developmental Disabilities Assistance and Bill of Rights Act, 42 U. S. C. §§ 6010(1), (2). In addition, the Government has conditioned federal education funds on a State's assurance that retarded children will enjoy an education that, "to the maximum extent appropriate," is integrated with that of nonmentally retarded children. Education of the Handicapped Act, 20 U. S. C. § 1412(5)(B). The Government has also facilitated the hiring of the mentally retarded into the federal civil service by exempting them from the requirement of competitive examina-

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elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that *those* characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point there's not much left of the immutability theory, is there?" J. Ely, Democracy and Distrust 150 (1980) (footnote omitted). See also *id.*, at 154–155.

tion. See 5 CFR § 213.3102(t) (1984). The State of Texas has similarly enacted legislation that acknowledges the special status of the mentally retarded by conferring certain rights upon them, such as "the right to live in the least restrictive setting appropriate to [their] individual needs and abilities," including "the right to live . . . in a group home." Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat. Ann., Art. 5547–300, § 7 (Vernon Supp. 1985).[11]

Such legislation thus singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others. That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable. It may be, as CLC contends, that legislation designed to benefit, rather than disadvantage, the retarded would generally withstand examination under a test of heightened scrutiny. See Brief for Respondents 38–41. The relevant inquiry, however, is whether heightened scrutiny is constitutionally mandated in the first instance. Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all. Much recent legislation intended to benefit the retarded also assumes the need for measures that might be perceived to disadvantage them. The Education of the Handicapped Act, for example, requires an "appropriate" education, not one that is equal in all respects

[11] CLC originally sought relief under the Act, but voluntarily dismissed this pendent state claim when the District Court indicated that its presence might make abstention appropriate. The Act had never been construed by the Texas courts. App. 12, 14, 84–87.

A number of States have passed legislation prohibiting zoning that excludes the retarded. See, *e. g.*, Cal. Health & Safety Code Ann. § 1566 *et seq.* (West 1979 and Supp. 1985); Conn. Gen. Stat. § 8–3e (Supp. 1985); N. D. Cent. Code § 25–16–14(2) (Supp. 1983); R. I. Gen. Laws. § 45–24–22 (1980). See also Md. Health Code Ann. § 7–102 (Supp. 1984).

to the education of nonretarded children; clearly, admission to a class that exceeded the abilities of a retarded child would not be appropriate.[12] Similarly, the Developmental Disabilities Assistance Act and the Texas Act give the retarded the right to live only in the "least restrictive setting" appropriate to their abilities, implicitly assuming the need for at least some restrictions that would not be imposed on others.[13] Especially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts.

Third, the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.

Fourth, if the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only

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[12] The Act, which specifically included the mentally retarded in its definition of handicapped, see 20 U. S. C. § 1401(1), also recognizes the great variations within the classification of retarded children. The Act requires that school authorities devise an "individualized educational program," § 1401(19), that is "tailored to the unique needs of the handicapped child." *Hendrick Hudson District Board of Education* v. *Rowley*, 458 U. S. 176, 181 (1982).

[13] The Developmental Disabilities Assistance Act also withholds public funds from any program that does not prohibit the use of physical restraint "unless absolutely necessary." 42 U. S. C. § 6010(3).

the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms. But the appropriate method of reaching such instances is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us. Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.

Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. See *Zobel* v. *Williams*, 457 U. S. 55, 61–63 (1982); *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, 535 (1973). Furthermore, some objectives—

such as "a bare . . . desire to harm a politically unpopular group," *id.*, at 534—are not legitimate state interests. See also *Zobel*, *supra*, at 63. Beyond that, the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law.

IV

We turn to the issue of the validity of the zoning ordinance insofar as it requires a special use permit for homes for the mentally retarded.[14] We inquire first whether requiring a special use permit for the Featherston home in the circumstances here deprives respondents of the equal protection of the laws. If it does, there will be no occasion to decide whether the special use permit provision is facially invalid where the mentally retarded are involved, or to put it another way, whether the city may never insist on a special use permit for a home for the mentally retarded in an R–3 zone. This is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments. *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 501–502 (1985); *United States* v. *Grace*, 461 U. S. 171 (1983); *NAACP* v. *Button*, 371 U. S. 415 (1963).

The constitutional issue is clearly posed. The city does not require a special use permit in an R–3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feebleminded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherston home, and it does so, as the District Court found, because it would be a facility for the men-

[14] It goes without saying that there is nothing before us with respect to the validity of requiring a special use permit for the other uses listed in the ordinance. See n. 3, *supra*.

tally retarded. May the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?

It is true, as already pointed out, that the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R–3 zone without a special permit. But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.

The District Court found that the City Council's insistence on the permit rested on several factors. First, the Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U. S. 713, 736–737 (1964), and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U. S. 429, 433 (1984).

Second, the Council had two objections to the location of the facility. It was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the Featherston home. But the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation. The other objection to the home's location was that it was located on "a five hundred year flood plain." This concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit. The same may be said of another concern of the Council—doubts about the legal responsibility for actions which the mentally retarded might take. If there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.

Fourth, the Council was concerned with the size of the home and the number of people that would occupy it. The District Court found, and the Court of Appeals repeated, that "[i]f the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance." App. 93; 726 F. 2d, at 200. Given this finding, there would be no restrictions on the number of people who could occupy this home as a boarding house, nursing home, family dwelling, fraternity house, or dormitory. The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer dis-

ability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes. Those who would live in the Featherston home are the type of individuals who, with supporting staff, satisfy federal and state standards for group housing in the community; and there is no dispute that the home would meet the federal square-footage-per-resident requirement for facilities of this type. See 42 CFR § 442.447 (1984). In the words of the Court of Appeals, "[t]he City never justifies its apparent view that other people can live under such 'crowded' conditions when mentally retarded persons cannot." 726 F. 2d, at 202.

In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.

The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

The judgment of the Court of Appeals is affirmed insofar as it invalidates the zoning ordinance as applied to the Featherston home. The judgment is otherwise vacated, and the case is remanded.

It is so ordered.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE joins, concurring.

The Court of Appeals disposed of this case as if a critical question to be decided were which of three clearly defined standards of equal protection review should be applied to a legislative classification discriminating against the mentally retarded.[1] In fact, our cases have not delineated three—or even one or two—such well-defined standards.[2] Rather, our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from "strict scrutiny" at one extreme to "rational basis" at the other. I have never been persuaded that these so-called "standards" adequately explain the decisional process.[3] Cases involving classifications based on alienage,

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[1] The three standards—"rationally related to a legitimate state interest," "somewhat heightened review," and "strict scrutiny" are briefly described *ante*, at 440, 441.

[2] In *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 176–177, n. 10 (1980), after citing 11 cases applying the rational-basis standard, the Court stated: "The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles." Commenting on the intermediate standard of review in his dissent in *Craig* v. *Boren*, 429 U. S. 190, 220–221 (1976), JUSTICE REHNQUIST wrote:

"I would think we have had enough difficulty with the two standards of review which our cases have recognized—the norm of 'rational basis,' and the 'compelling state interest' required where a 'suspect classification' is involved—so as to counsel weightily against the insertion of still another 'standard' between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough."

[3] Cf. *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 98 (1973) (MARSHALL, J., dissenting, joined by Douglas, J.) (criticizing "the Court's rigidified approach to equal protection analysis").

illegal residency, illegitimacy, gender, age, or—as in this case—mental retardation, do not fit well into sharply defined classifications.

"I am inclined to believe that what has become known as the [tiered] analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." *Craig* v. *Boren*, 429 U. S. 190, 212 (1976) (STEVENS, J., concurring). In my own approach to these cases, I have always asked myself whether I could find a "rational basis" for the classification at issue. The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.[4] Thus, the word "rational"—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.[5]

The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause. It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all

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[4] "I therefore believe that we must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature. If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that that cost should be incurred." *United States Railroad Retirement Board* v. *Fritz*, 449 U. S., at 180–181 (STEVENS, J., concurring in judgment).

[5] See *Lehr* v. *Robertson*, 463 U. S. 248, 265 (1983); *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100 (1976).

on the citizen's willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply "strict scrutiny," or even "heightened scrutiny," to decide such cases.

In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws?[6] What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?[7] In most cases the answer to these questions will tell us whether the statute has a "rational basis." The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications, but they will provide differing results in cases involving classifications based on alienage,[8] gender,[9] or illegitimacy.[10] But that is not because we

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[6] The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a "tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made." *Mathews* v. *Lucas*, 427 U. S. 495, 520–521 (1976) (STEVENS, J., dissenting). See also *New York Transit Authority* v. *Beazer*, 440 U. S. 568, 593 (1979).

[7] See *Foley* v. *Connelie*, 435 U. S. 291, 308 (1978) (STEVENS, J., dissenting).

[8] See *Mathews* v. *Diaz*, 426 U. S. 67, 78–80 (1976); compare *Sugarman* v. *Dougall*, 413 U. S. 634 (1973), and *In re Griffiths*, 413 U. S. 717 (1973), with *Ambach* v. *Norwick*, 441 U. S. 68 (1979), and *Foley* v. *Connelie*, 435 U. S. 291 (1978).

[9] Compare *Reed* v. *Reed*, 404 U. S. 71 (1971), and *Califano* v. *Goldfarb*, 430 U. S. 199 (1977), with *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979), and *Heckler* v. *Mathews*, 465 U. S. 728 (1984).

[10] Compare *Lalli* v. *Lalli*, 439 U. S. 259 (1978), with *Trimble* v. *Gordon*, 430 U. S. 762 (1977).

apply an "intermediate standard of review" in these cases; rather it is because the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve.[11]

Every law that places the mentally retarded in a special class is not presumptively irrational. The differences between mentally retarded persons and those with greater mental capacity are obviously relevant to certain legislative decisions. An impartial lawmaker—indeed, even a member of a class of persons defined as mentally retarded—could rationally vote in favor of a law providing funds for special education and special treatment for the mentally retarded. A mentally retarded person could also recognize that he is a member of a class that might need special supervision in some situations, both to protect himself and to protect others. Restrictions on his right to drive cars or to operate hazardous equipment might well seem rational even though they deprived him of employment opportunities and the kind of freedom of travel enjoyed by other citizens. "That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable." *Ante*, at 444.

Even so, the Court of Appeals correctly observed that through ignorance and prejudice the mentally retarded "have been subjected to a history of unfair and often grotesque mistreatment." 726 F. 2d 191, 197 (CA5 1984). The dis-

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[11] See *Michael M.* v. *Superior Court of Sonoma County*, 450 U. S. 464, 497–498, and n. 4 (1981) (STEVENS, J., dissenting). See also *Caban* v. *Mohammed*, 441 U. S. 380, 406–407 (1979) (STEVENS, J., dissenting) ("But as a matter of equal protection analysis, it is perfectly obvious that at the time and immediately after a child is born out of wedlock, differences between men and women justify some differential treatment of the mother and father in the adoption process").

crimination against the mentally retarded that is at issue in this case is the city's decision to require an annual special use permit before property in an apartment house district may be used as a group home for persons who are mildly retarded. The record convinces me that this permit was required because of the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside in respondent's home.[12]

Although the city argued in the Court of Appeals that legitimate interests of the neighbors justified the restriction, the court unambiguously rejected that argument. *Id.*, at 201. In this Court, the city has argued that the discrimination was really motivated by a desire to protect the mentally retarded from the hazards presented by the neighborhood. Zoning ordinances are not usually justified on any such basis, and in this case, for the reasons explained by the Court, *ante*, at 447–450, I find that justification wholly unconvincing. I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case.

Accordingly, I join the opinion of the Court.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, concurring in the judgment in part and dissenting in part.

The Court holds that all retarded individuals cannot be grouped together as the "feebleminded" and deemed presumptively unfit to live in a community. Underlying this holding is the principle that mental retardation *per se* cannot be a proxy for depriving retarded people of their rights and interests without regard to variations in individual ability.

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[12] In fact, the ordinance provides that each applicant for a special use permit "shall be required to obtain the signatures of the property owners within two hundred (200) feet of the property to be used." App. 63.

With this holding and principle I agree. The Equal Protection Clause requires attention to the capacities and needs of retarded people as individuals.

I cannot agree, however, with the way in which the Court reaches its result or with the narrow, as-applied remedy it provides for the city of Cleburne's equal protection violation. The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review—the heightened scrutiny—that actually leads to its invalidation. Moreover, in invalidating Cleburne's exclusion of the "feebleminded" only as applied to respondents, rather than on its face, the Court radically departs from our equal protection precedents. Because I dissent from this novel and truncated remedy, and because I cannot accept the Court's disclaimer that no "more exacting standard" than ordinary rational-basis review is being applied, *ante*, at 442, I write separately.

I

At the outset, two curious and paradoxical aspects of the Court's opinion must be noted. First, because the Court invalidates Cleburne's zoning ordinance on rational-basis grounds, the Court's wide-ranging discussion of heightened scrutiny is wholly superfluous to the decision of this case. This "two for the price of one" approach to constitutional decisionmaking—rendering two constitutional rulings where one is enough to decide the case—stands on their head traditional and deeply embedded principles governing exercise of the Court's Article III power. Just a few weeks ago, the Court "call[ed] to mind two of the cardinal rules governing

the federal courts: 'One, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 501 (1985) (WHITE, J.) (quoting *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885)).[1] When a lower court correctly decides a case, albeit on what this Court concludes are unnecessary constitutional grounds,[2] "our usual custom" is not to compound the problem by following suit but rather to affirm on the narrower, dispositive ground available. *Alexander* v. *Louisiana*, 405 U. S. 625, 633 (1972).[3] The Court offers no principled justification for departing from these principles, nor, given our equal protection precedents, could it. See *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 724, n. 9 (1982) (declining to address strict scrutiny when heightened scrutiny sufficient to invalidate action challenged); *Stanton* v. *Stanton*, 421 U. S. 7, 13 (1975)

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[1] See also *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable"); *Burton* v. *United States*, 196 U. S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case"); see generally *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring).

Even today, the Court again "calls to mind" these principles, *ante*, at 447, but given the Court's lengthy dicta on heightened scrutiny, this call to principle must be read with some irony.

[2] I do not suggest the lower court erred in relying on heightened scrutiny, for I believe more searching inquiry than the traditional rational-basis test is required to invalidate Cleburne's ordinance. See *infra*, at 458–460.

[3] See also *Three Affiliated Tribes* v. *Wold Engineering*, 467 U. S. 138, 157–158 (1984); *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 181 (1979).

(same); *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612, 618 (1985) (declining to reach heightened scrutiny in review of residency-based classifications that fail rational-basis test); *Zobel* v. *Williams*, 457 U. S. 55, 60–61 (1982) (same); cf. *Mitchell* v. *Forsyth*, 472 U. S. 511, 537–538 (1985) (O'CONNOR, J., concurring in part).

Second, the Court's heightened-scrutiny discussion is even more puzzling given that Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny. To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called "second order" rational-basis review rather than "heightened scrutiny." But however labeled, the rational-basis test invoked today is most assuredly not the rational-basis test of *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483 (1955); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522 (1959), and their progeny.

The Court, for example, concludes that legitimate concerns for fire hazards or the serenity of the neighborhood do not justify singling out respondents to bear the burdens of these concerns, for analogous permitted uses appear to pose similar threats. Yet under the traditional and most minimal version of the rational-basis test, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical of Oklahoma, Inc.*, *supra*, at 489; see *American Federation of Labor* v. *American Sash Co.*, 335 U. S. 538 (1949); *Semler* v. *Dental Examiners*, 294 U. S. 608 (1935). The "record" is said not to support the ordinance's classifications, *ante*, at 448, 450, but under the traditional standard we do not sift through the record to determine whether policy decisions are squarely supported by a firm factual foundation. *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 196 (1983); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 461–462,

464 (1981); *Firemen* v. *Chicago, R. I. & P. R. Co.*, 393 U. S. 129, 138–139 (1968). Finally, the Court further finds it "difficult to believe" that the retarded present different or special hazards inapplicable to other groups. In normal circumstances, the burden is not on the legislature to convince the Court that the lines it has drawn are sensible; legislation is presumptively constitutional, and a State "is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference" to its goals. *Allied Stores of Ohio, Inc.* v. *Bowers*, *supra*, at 527; see *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976); *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 68–70 (1913).

I share the Court's criticisms of the overly broad lines that Cleburne's zoning ordinance has drawn. But if the ordinance is to be invalidated for its imprecise classifications, it must be pursuant to more powerful scrutiny than the minimal rational-basis test used to review classifications affecting only economic and commercial matters. The same imprecision in a similar ordinance that required opticians but not optometrists to be licensed to practice, see *Williamson* v. *Lee Optical of Oklahoma, Inc.*, *supra*, or that excluded new but not old businesses from parts of a community, see *New Orleans* v. *Dukes*, *supra*, would hardly be fatal to the statutory scheme.

The refusal to acknowledge that something more than minimum rationality review is at work here is, in my view, unfortunate in at least two respects.[4] The suggestion that

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[4]The two cases the Court cites in its rational-basis discussion, *Zobel* v. *Williams*, 457 U. S. 55 (1982), and *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528 (1973), expose the special nature of the rational-basis test employed today. As two of only a handful of modern equal protection cases striking down legislation under what purports to be a rational-basis standard, these cases must be and generally have been viewed as intermediate review decisions masquerading in rational-basis language. See, *e. g.*, L. Tribe, American Constitutional Law § 16–31,

the traditional rational-basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching "ordinary" rational-basis review—a small and regrettable step back toward the days of *Lochner* v. *New York*, 198 U. S. 45 (1905). Moreover, by failing to articulate the factors that justify today's "second order" rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny. Candor requires me to acknowledge the particular factors that justify invalidating Cleburne's zoning ordinance under the careful scrutiny it today receives.

II

I have long believed the level of scrutiny employed in an equal protection case should vary with "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 99 (1973) (MARSHALL, J., dissenting). See also *Plyler* v. *Doe*, 457 U. S. 202, 230–231 (1982) (MARSHALL, J., concurring); *Dandridge* v. *Williams*, 397 U. S. 471, 508 (1970) (MARSHALL, J., dissenting). When a zoning ordinance works to exclude the retarded from all residential districts in a community, these two considerations require that the ordinance be convincingly justified as substantially furthering legitimate and important purposes. *Plyler*, *supra*; *Mississippi University for Women* v. *Hogan*, 458 U. S. 718 (1982); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973); *Mills* v. *Habluetzel*, 456 U. S. 91 (1982); see also *Buchanan* v. *Warley*, 245 U. S. 60 (1917).

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p. 1090, n. 10 (1978) (discussing *Moreno*); see also *Moreno*, *supra*, at 538 (Douglas, J., concurring); *Zobel*, *supra*, at 65 (BRENNAN, J., concurring).

First, the interest of the retarded in establishing group homes is substantial. The right to "establish a home" has long been cherished as one of the fundamental liberties embraced by the Due Process Clause. See *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). For retarded adults, this right means living together in group homes, for as deinstitutionalization has progressed, group homes have become the primary means by which retarded adults can enter life in the community. The District Court found as a matter of fact that

> "[t]he availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community." App. to Pet. for Cert. A–8.

Excluding group homes deprives the retarded of much of what makes for human freedom and fulfillment—the ability to form bonds and take part in the life of a community.[5]

Second, the mentally retarded have been subject to a "lengthy and tragic history," *University of California Regents* v. *Bakke*, 438 U. S. 265, 303 (1978) (opinion of POWELL, J.), of segregation and discrimination that can only be called grotesque. During much of the 19th century, mental retardation was viewed as neither curable nor dangerous and the retarded were largely left to their own devices.[6] By the latter part of the century and during the first decades of the new one, however, social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme

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[5] Indeed, the group home in this case was specifically located near a park, a school, and a shopping center so that its residents would have full access to the community at large.

[6] S. Herr, Rights and Advocacy for Retarded People 18 (1983).

xenophobia of those years,[7] leading medical authorities and others began to portray the "feebleminded" as a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems."[8] A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race."[9] Retarded children were categorically excluded from

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[7] On the role of these ideologies in this era, see K. Stampp, Era of Reconstruction, 1865–1877, pp. 18–22 (1965).

[8] H. Goddard, The Possibilities of Research as Applied to the Prevention of Feeblemindedness, Proceedings of the National Conference of Charities and Correction 307 (1915), cited in A. Deutsch, The Mentally Ill in America 360 (2d ed. 1949). See also Fernald, The Burden of Feeblemindedness, 17 J. Psycho-Asthenics 87, 90 (1913) (the retarded "cause unutterable sorrow at home and are a menace and danger to the community"); Terman, Feeble-Minded Children in the Public Schools of California, 5 Schools & Society 161 (1917) ("[O]nly recently have we begun to recognize how serious a menace [feeblemindedness] is to the social, economic and moral welfare of the state . . . . [I]t is responsible . . . for the majority of cases of chronic and semi-chronic pauperism, and for much of our alcoholism, prostitution, and venereal diseases"). Books with titles such as "The Menace of the Feeble Minded in Connecticut" (1915), issued by the Connecticut School for Imbeciles, became commonplace. See C. Frazier, (Chairman, Executive Committee of Public Charities Assn. of Pennsylvania), The Menace of the Feeble-Minded In Pennsylvania (1913); W. Fernald, The Burden of Feeble-Mindedness (1912) (Mass.); Juvenile Protection Association of Cincinnati, The Feeble-Minded, Or the Hub to Our Wheel of Vice (1915) (Ohio). The resemblance to such works as R. Shufeldt, The Negro: A Menace to American Civilization (1907), is striking, and not coincidental.

[9] A. Moore, The Feeble-Minded in New York 3 (1911). This book was sponsored by the State Charities Aid Association. See also P. Tyor & L. Bell, Caring for the Retarded in America 71–104 (1984). The segregationist purpose of these laws was clear. See, *e. g.*, Act of Mar. 22, 1915, ch. 90, 1915 Tex. Gen. Laws 143 (repealed 1955) (Act designed to relieve

public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them.[10] State laws deemed the retarded "unfit for citizenship."[11]

Segregation was accompanied by eugenic marriage and sterilization laws that extinguished for the retarded one of the "basic civil rights of man"—the right to marry and procreate. *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942). Marriages of the retarded were made, and in some States continue to be, not only voidable but also often a criminal offense.[12] The purpose of such limitations, which frequently applied only to women of child-bearing age, was unabashedly eugenic: to prevent the retarded from propagating.[13] To assure this end, 29 States enacted compulsory eugenic sterilization laws between 1907 and 1931. J. Landman, Human Sterilization 302–303 (1932). See *Buck* v. *Bell*, 274 U. S. 200, 207 (1927) (Holmes, J.); cf. *Plessy* v. *Fergu-*

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society of "the heavy economic and moral losses arising from the existence at large of these unfortunate persons").

[10] See *Pennsylvania Assn. for Retarded Children* v. *Pennsylvania*, 343 F. Supp. 279, 294–295 (ED Pa. 1972); see generally S. Sarason & J. Doris, Educational Handicap, Public Policy, and Social History 271–272 (1979).

[11] Act of Apr. 3, 1920, ch. 210, § 17, 1920 Miss. Laws 288, 294.

[12] See, *e. g.*, Act of Mar. 19, 1928, ch. 156, 1928 Ky. Acts 534, *remains in effect*, Ky. Rev. Stat. § 402.990(2) (1984); Act of May 25, 1905, No. 136, § 1, 1905 Mich. Pub. Acts 185, 186, *remains in effect* Mich. Comp. Laws § 551.6 (1979); Act of Apr. 3, 1920, ch. 210, § 29, 1920 Miss. Gen. Laws 288, 300, *remains in effect* with minor changes, Miss. Code Ann. § 41–21–45 (1972).

[13] See Chamberlain, Current Legislation—Eugenics and Limitations of Marriage, 9 A. B. A. J. 429 (1923); *Lau* v. *Lau*, 81 N. H. 44, 122 A. 345, 346 (1923); *State* v. *Wyman*, 118 Conn. 501, 173 A. 155, 156 (1934). See generally Linn & Bowers, The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons—The Eternal Child Grows Up, 13 Gonz. L. Rev. 625 (1978); Shaman, Persons Who Are Mentally Retarded: Their Right to Marry and Have Children, 12 Family L. Q. 61 (1978); Note, The Right of the Mentally Disabled to Marry: A Statutory Evaluation, 15 J. Family L. 463 (1977).

son, 163 U. S. 537 (1896); *Bradwell* v. *Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring in judgment).

Prejudice, once let loose, is not easily cabined. See *University of California Regents* v. *Bakke*, 438 U. S., at 395 (opinion of MARSHALL, J.). As of 1979, most States still categorically disqualified "idiots" from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials.[14] Not until Congress enacted the Education of the Handicapped Act, 84 Stat. 175, as amended, 20 U. S. C. § 1400 *et seq.*, were "the door[s] of public education" opened wide to handicapped children. *Hendrick Hudson District Board of Education* v. *Rowley*, 458 U. S. 176, 192 (1982).[15] But most important, lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them.[16]

In light of the importance of the interest at stake and the history of discrimination the retarded have suffered, the Equal Protection Clause requires us to do more than review the distinctions drawn by Cleburne's zoning ordinance as if they appeared in a taxing statute or in economic or commercial legislation.[17] The searching scrutiny I would give to re-

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[14] See Note, Mental Disability and the Right to Vote, 88 Yale L. J. 1644 (1979).

[15] Congress expressly found that most handicapped children, including the retarded, were simply shut out from the public school system. See 20 U. S. C. § 1400(b).

[16] See generally G. Allport, The Nature of Prejudice (1958) (separateness among groups exaggerates differences).

[17] This history of discrimination may well be directly relevant to the issue before the Court. Cleburne's current exclusion of the "feeble-minded" in its 1965 zoning ordinance appeared as a similar exclusion of the "feeble-minded" in the city's 1947 ordinance, see Act of Sept. 26, 1947, § 5; the latter tracked word for word a similar exclusion in the 1929 comprehensive zoning ordinance for the nearby city of Dallas. See Dallas Ordinance, No. 2052, § 4, passed Sept. 11, 1929.

Although we have been presented with no legislative history for Cleburne's zoning ordinances, this genealogy strongly suggests that Cle-

strictions on the ability of the retarded to establish community group homes leads me to conclude that Cleburne's vague generalizations for classifying the "feeble-minded" with drug addicts, alcoholics, and the insane, and excluding them where the elderly, the ill, the boarder, and the transient are allowed, are not substantial or important enough to overcome the suspicion that the ordinance rests on impermissible assumptions or outmoded and perhaps invidious stereotypes. See *Plyler* v. *Doe*, 457 U. S. 202 (1982); *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984); *Mississippi University for Women* v. *Hogan*, 458 U. S. 718 (1982); *Mills* v. *Habluetzel*, 456 U. S. 91 (1982).

III

In its effort to show that Cleburne's ordinance can be struck down under no "more exacting standard . . . than is normally accorded economic and social legislation," *ante*, at 442, the Court offers several justifications as to why the retarded do not warrant heightened judicial solicitude. These justifications, however, find no support in our heightened-scrutiny precedents and cannot withstand logical analysis.

The Court downplays the lengthy "history of purposeful unequal treatment" of the retarded, see *San Antonio Independent School District* v. *Rodriguez*, 411 U. S., at 28, by pointing to recent legislative action that is said to "beli[e] a continuing antipathy or prejudice." *Ante*, at 443. Building on this point, the Court similarly concludes that the retarded

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burne's current exclusion of the "feeble-minded" was written in the darkest days of segregation and stigmatization of the retarded and simply carried over to the current ordinance. Recently we held that extant laws originally motivated by a discriminatory purpose continue to violate the Equal Protection Clause, even if they would be permissible were they reenacted without a discriminatory motive. See *Hunter* v. *Underwood*, 471 U. S. 222, 233 (1985). But in any event, the roots of a law that by its terms excludes from a community the "feebleminded" are clear. As the examples above attest, see n. 7, *supra*, "feebleminded" was the defining term for all retarded people in the era of overt and pervasive discrimination.

are not "politically powerless" and deserve no greater judicial protection than "[a]ny minority" that wins some political battles and loses others. *Ante,* at 445. The import of these conclusions, it seems, is that the only discrimination courts may remedy is the discrimination they alone are perspicacious enough to see. Once society begins to recognize certain practices as discriminatory, in part because previously stigmatized groups have mobilized politically to lift this stigma, the Court would refrain from approaching such practices with the added skepticism of heightened scrutiny.

Courts, however, do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. Compare *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), and *Bradwell* v. *Illinois, supra,* at 141 (Bradley, J., concurring in judgment), with *Brown* v. *Board of Education,* 347 U. S. 483 (1954), and *Reed* v. *Reed,* 404 U. S. 71 (1971). Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality. In an analysis the Court today ignores, the Court reached this very conclusion when it extended heightened scrutiny to gender classifications and drew on parallel legislative developments to support that extension:

> "[O]ver the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifi-

> cations [citing examples]. Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration." *Frontiero* v. *Richardson*, 411 U. S., at 687.[18]

Moreover, even when judicial action *has* catalyzed legislative change, that change certainly does not eviscerate the underlying constitutional principle. The Court, for example, has never suggested that race-based classifications became any less suspect once extensive legislation had been enacted on the subject. See *Palmore* v. *Sidoti*, 466 U. S. 429 (1984).

For the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same; outdated statutes are still on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people. Heightened judicial scrutiny of action appearing to impose unnecessary barriers to the retarded is required in light of increasing recognition that such barriers are inconsistent with evolving principles of equality embedded in the Fourteenth Amendment.

The Court also offers a more general view of heightened scrutiny, a view focused primarily on when heightened scrutiny does *not* apply as opposed to when it does apply.[19] Two

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[18] Although *Frontiero* was a plurality opinion, it is now well established that gender classifications receive heightened scrutiny. See, *e. g.*, *Mississippi University for Women* v. *Hogan*, 458 U. S. 718 (1982).

[19] For its general theories about heightened scrutiny, the Court relies heavily, indeed virtually exclusively, on the "lesson" of *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307 (1976). The brief *per curiam* in *Murgia*, however, was handed down in the days before the Court explicitly acknowledged the existence of heightened scrutiny. See *Craig* v. *Boren*, 429 U. S. 190 (1976); *id.*, at 210 (POWELL, J., concurring). *Murgia* explains why age-based distinctions do not trigger strict scrutiny,

principles appear central to the Court's theory. First, heightened scrutiny is said to be inapplicable where *individuals* in a group have distinguishing characteristics that legislatures properly may take into account in some circumstances. *Ante*, at 441–442. Heightened scrutiny is also purportedly inappropriate when many legislative classifications affecting the *group* are likely to be valid. We must, so the Court says, "look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us," in deciding whether to apply heightened scrutiny. *Ante*, at 446.

If the Court's first principle were sound, heightened scrutiny would have to await a day when people could be cut from a cookie mold. Women are hardly alike in all their characteristics, but heightened scrutiny applies to them because legislatures can rarely use gender itself as a proxy for these other characteristics. Permissible distinctions between persons must bear a reasonable relationship to their *relevant* characteristics, *Zobel* v. *Williams*, 457 U. S., at 70 (BRENNAN, J., concurring), and gender *per se* is almost never relevant. Similarly, that some retarded people have reduced capacities in some areas does not justify using retardation as a proxy for reduced capacity in areas where relevant individual variations in capacity do exist.

The Court's second assertion—that the standard of review must be fixed with reference to the number of classifications to which a characteristic would validly be relevant—is similarly flawed. Certainly the assertion is not a logical one; that a characteristic may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not. A sign that says "men only" looks very

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but says nothing about whether such distinctions warrant heightened scrutiny. Nor have subsequent cases addressed this issue. See *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979).

different on a bathroom door than a courthouse door. But see *Bradwell* v. *Illinois*, 16 Wall. 130 (1873).

Our heightened-scrutiny precedents belie the claim that a characteristic must virtually always be irrelevant to warrant heightened scrutiny. *Plyler*, for example, held that the status of being an undocumented alien is not a "constitutional irrelevancy," and therefore declined to review with strict scrutiny classifications affecting undocumented aliens. 457 U. S., at 219, n. 19. While *Frontiero* stated that gender "frequently" and "often" bears no relation to legitimate legislative aims, it did not deem gender an impermissible basis of state action in all circumstances. 411 U. S., at 686–687. Indeed, the Court has upheld some gender-based classifications. *Rostker* v. *Goldberg*, 453 U. S. 57 (1981); *Michael M.* v. *Superior Court of Sonoma County*, 450 U. S. 464 (1981). Heightened but not strict scrutiny is considered appropriate in areas such as gender, illegitimacy, or alienage[20] because the Court views the trait as relevant under some circumstances but not others.[21] That view—indeed the very concept of heightened, as opposed to strict, scrutiny—is flatly inconsistent with the notion that heightened scrutiny should not apply to the retarded because "mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions." *Ante*, at 446. Because the government also may not take this characteristic into account in many circumstances, such as those presented here, careful review is required to separate the permissible from the invalid in classifications relying on retardation.

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[20] Alienage classifications present a related variant, for strict scrutiny is applied to such classifications in the economic and social area, but only heightened scrutiny is applied when the classification relates to "political functions." *Cabell* v. *Chavez-Salido*, 454 U. S. 432, 439 (1982); see also *Bernal* v. *Fainter*, 467 U. S. 216, 220–222 (1984). Thus, characterization of the area to which an alienage classification applies is necessary to determine how strongly it must be justified.

[21] I express no view here as to whether strict scrutiny ought to be extended to these classifications.

The fact that retardation may be deemed a constitutional irrelevancy in *some* circumstances is enough, given the history of discrimination the retarded have suffered, to require careful judicial review of classifications singling out the retarded for special burdens. Although the Court acknowledges that many instances of invidious discrimination against the retarded still exist, the Court boldly asserts that "in the vast majority of situations" special treatment of the retarded is "not only legitimate but also desirable." *Ante*, at 444. That assertion suggests the Court would somehow have us calculate the percentage of "situations" in which a characteristic is validly and invalidly invoked before determining whether heightened scrutiny is appropriate. But heightened scrutiny has not been "triggered" in our past cases only after some undefined numerical threshold of invalid "situations" has been crossed. An inquiry into constitutional principle, not mathematics, determines whether heightened scrutiny is appropriate. Whenever evolving principles of equality, rooted in the Equal Protection Clause, require that certain classifications be viewed as *potentially* discriminatory, and when history reveals systemic unequal treatment, more searching judicial inquiry than minimum rationality becomes relevant.

Potentially discriminatory classifications exist only where some constitutional basis can be found for presuming that equal rights are required. Discrimination, in the Fourteenth Amendment sense, connotes a substantive constitutional judgment that two individuals or groups are entitled to be treated equally with respect to something. With regard to economic and commercial matters, no basis for such a conclusion exists, for as Justice Holmes urged the *Lochner* Court, the Fourteenth Amendment was not "intended to embody a particular economic theory . . . ." *Lochner* v. *New York*, 198 U. S., at 75 (dissenting). As a matter of substantive policy, therefore, government is free to move in any

direction, or to change directions,[22] in the economic and commercial sphere.[23] The structure of economic and commercial life is a matter of political compromise, not constitutional principle, and no norm of equality requires that there be as many opticians as optometrists, see *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483 (1955), or new businesses as old, see *New Orleans* v. *Dukes*, 427 U. S. 297 (1976).

But the Fourteenth Amendment does prohibit other results under virtually all circumstances, such as castes created by law along racial or ethnic lines, see *Palmore* v. *Sidoti*, 466 U. S., at 432–433; *Loving* v. *Virginia*, 388 U. S. 1 (1967); *McLaughlin* v. *Florida*, 379 U. S. 184 (1964); *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948); *Hernandez* v. *Texas*, 347 U. S. 475 (1954), and significantly constrains the range of permissible government choices where gender or illegitimacy, for example, are concerned. Where such constraints, derived from the Fourteenth Amendment, are present, and where history teaches that they have systemically been ignored, a "more searching judicial inquiry" is required. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938).

That more searching inquiry, be it called heightened scrutiny or "second order" rational-basis review, is a method of

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[22] Constitutional provisions other than the Equal Protection Clause, such as the Contracts Clause, the Just Compensation Clause, or the Due Process Clause, may constrain the extent to which government can upset settled expectations when changing course and the process by which it must implement such changes.

[23] Only when it can be said that "Congress misapprehended what it was doing," *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 193 (1980) (BRENNAN, J., dissenting), will a classification fail the minimal rational-basis standard. Even then, the classification fails not because of limits on the directions which substantive policy can take in the economic and commercial area, but because the classification reflects *no* underlying substantive policy—it is simply arbitrary.

approaching certain classifications skeptically, with judgment suspended until the facts are in and the evidence considered. The government must establish that the classification is substantially related to important and legitimate objectives, see, *e. g.*, *Craig* v. *Boren*, 429 U. S. 190 (1976), so that valid and sufficiently weighty policies actually justify the departure from equality. Heightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group like the retarded, but it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day. By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment. Where classifications based on a particular characteristic have done so in the past, and the threat that they may do so remains, heightened scrutiny is appropriate.[24]

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[24] No single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened or strict scrutiny; experience, not abstract logic, must be the primary guide. The "political powerlessness" of a group may be relevant, *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 28 (1973), but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates. Minors cannot vote and thus might be considered politically powerless to an extreme degree. Nonetheless, we see few statutes reflecting prejudice or indifference to minors, and I am not aware of any suggestion that legislation affecting them be viewed with the suspicion of heightened scrutiny. Similarly, immutability of the trait at issue may be relevant, but many immutable characteristics, such as height or blindness, are valid bases of governmental action and classifications under a variety of circumstances. See *ante*, at 442–443, n. 10.

The political powerlessness of a group and the immutability of its defining trait are relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs. Statutes discriminating against the young

As the history of discrimination against the retarded and its continuing legacy amply attest, the mentally retarded have been, and in some areas may still be, the targets of action the Equal Protection Clause condemns. With respect to a liberty so valued as the right to establish a home in the community, and so likely to be denied on the basis of irrational fears and outright hostility, heightened scrutiny is surely appropriate.

IV

In light of the scrutiny that should be applied here, Cleburne's ordinance sweeps too broadly to dispel the suspicion that it rests on a bare desire to treat the retarded as outsiders, pariahs who do not belong in the community. The Court, while disclaiming that special scrutiny is necessary or warranted, reaches the same conclusion. Rather than striking the ordinance down, however, the Court invalidates it merely as applied to respondents. I must dissent from the novel proposition that "the preferred course of adjudication"

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have not been common nor need be feared because those who do vote and legislate were once themselves young, typically have children of their own, and certainly interact regularly with minors. Their social integration means that minors, unlike discrete and insular minorities, tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process.

The discreteness and insularity warranting a "more searching judicial inquiry," *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938), must therefore be viewed from a social and cultural perspective as well as a political one. To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community. Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereoptype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure. In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921) (Holmes, J.).

is to leave standing a legislative Act resting on "irrational prejudice" *ante*, at 450, thereby forcing individuals in the group discriminated against to continue to run the Act's gauntlet.

The Court appears to act out of a belief that the ordinance might be "rational" as applied to some subgroup of the retarded under some circumstances, such as those utterly without the capacity to live in a community, and that the ordinance should not be invalidated *in toto* if it is capable of ever being validly applied. But the issue is not "whether the city may never insist on a special use permit for the mentally retarded in an R–3 zone." *Ante*, at 447. The issue is whether the city may require a permit pursuant to a blunderbuss ordinance drafted many years ago to exclude all the "feeble-minded," or whether the city must enact a new ordinance carefully tailored to the exclusion of some well-defined subgroup of retarded people in circumstances in which exclusion might reasonably further legitimate city purposes.

By leaving the sweeping exclusion of the "feebleminded" to be applied to other groups of the retarded, the Court has created peculiar problems for the future. The Court does not define the relevant characteristics of respondents or their proposed home that make it unlawful to require them to seek a special permit. Nor does the Court delineate any principle that defines to which, if any, set of retarded people the ordinance *might* validly be applied. Cleburne's City Council and retarded applicants are left without guidance as to the potentially valid, and invalid, applications of the ordinance. As a consequence, the Court's as-applied remedy relegates future retarded applicants to the standardless discretion of low-level officials who have already shown an all too willing readiness to be captured by the "vague, undifferentiated fears," *ante*, at 449, of ignorant or frightened residents.

Invalidating on its face the ordinance's special treatment of the "feeble-minded," in contrast, would place the responsibility for tailoring and updating Cleburne's unconstitutional

ordinance where it belongs: with the legislative arm of the city of Cleburne. If Cleburne perceives a legitimate need for requiring a certain well-defined subgroup of the retarded to obtain special permits before establishing group homes, Cleburne will, after studying the problem and making the appropriate policy decisions, enact a new, more narrowly tailored ordinance. That ordinance might well look very different from the current one; it might separate group homes (presently treated nowhere in the ordinance) from hospitals, and it might define a narrow subclass of the retarded for whom even group homes could legitimately be excluded. Special treatment of the retarded might be ended altogether. But whatever the contours such an ordinance might take, the city should not be allowed to keep its ordinance on the books intact and thereby shift to the courts the responsibility to confront the complex empirical and policy questions involved in updating statutes affecting the mentally retarded. A legislative solution would yield standards and provide the sort of certainty to retarded applicants and administrative officials that case-by-case judicial rulings cannot provide. Retarded applicants should not have to continue to attempt to surmount Cleburne's vastly overbroad ordinance.

The Court's as-applied approach might be more defensible under circumstances very different from those presented here. Were the ordinance capable of being cleanly severed, in one judicial cut, into its permissible and impermissible applications, the problems I have pointed out would be greatly reduced. Cf. *United States* v. *Grace*, 461 U. S. 171 (1983) (statute restricting speech and conduct in Supreme Court building and on its grounds invalid as applied to sidewalks); but cf. *id.*, at 184–188 (opinion concurring in part and dissenting in part). But no readily apparent construction appears, nor has the Court offered one, to define which group of retarded people the city might validly require a permit of, and which it might not, in the R–3 zone. The Court's as-applied holding is particularly inappropriate here,

for nine-tenths of the group covered by the statute appears similarly situated to respondents, see *ante*, at 442, n. 9—a figure that makes the statutory presumption enormously overbroad. Cf. *Stanley* v. *Illinois*, 405 U. S. 645 (1972) (invalidating statutory presumption despite State's insistence that it validly applied to "most" of those covered).

To my knowledge, the Court has never before treated an equal protection challenge to a statute on an as-applied basis. When statutes rest on impermissibly overbroad generalizations, our cases have invalidated the presumption on its face.[25] We do not instead leave to the courts the task of redrafting the statute through an ongoing and cumbersome process of "as applied" constitutional rulings. In *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974), for

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[25] The Court strongly suggests that the loose fit of the ordinance to its purported objectives signifies that the ordinance rests on "an irrational prejudice," *ante*, at 450, an unconstitutional legislative purpose. See *Mississippi University for Women* v. *Hogan*, 458 U. S., at 725. In that event, recent precedent should make clear that the ordinance must, in its entirety, be invalidated. See *Hunter* v. *Underwood*, 471 U. S. 222 (1985). *Hunter* involved a 1902 constitutional provision disenfranchising various felons. Because that provision had been motivated, at least in part, by a desire to disenfranchise Negroes, we invalidated it on its face. In doing so, we did not suggest that felons could not be deprived of the vote through a statute motivated by some purpose other than racial discrimination. See *Richardson* v. *Ramirez*, 418 U. S. 24 (1974). Yet that possibility, or the possibility that the provision might have been only partly motivated by the desire to disenfranchise Negroes, did not suggest the provision should be invalidated only "as applied" to the particular plaintiffs in *Hunter* or even as applied to Negroes more generally. Instead we concluded:

"Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights* [v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977)]." 471 U. S., at 233.

If a discriminatory purpose infects a legislative Act, the Act itself is inconsistent with the Equal Protection Clause and cannot validly be applied to anyone.

example, we invalidated, *inter alia*, a maternity leave policy that required pregnant schoolteachers to take unpaid leave beginning five months before their expected due date. The school board argued that some teachers became physically incapable of performing adequately in the latter stages of their pregnancy, and we accepted this justification for purposes of our decision. Assuming the policy might validly be applied to some teachers, particularly in the last few weeks of their pregnancy, *id.*, at 647, n. 13, we nonetheless invalidated it *in toto*, rather than simply as applied to the particular plaintiff. The Court required school boards to employ "alternative administrative means" to achieve their legitimate health and safety goal, *id.*, at 647, or the legislature to enact a more carefully tailored statute, *id.*, at 647, n. 13.

Similarly, *Caban* v. *Mohammed*, 441 U. S. 380 (1979), invalidated a law that required parental consent to adoption from unwed mothers but not from unwed fathers. This distinction was defended on the ground, *inter alia*, that unwed fathers were often more difficult to locate, particularly during a child's infancy. We suggested the legislature might make proof of abandonment easier or proof of paternity harder, but we required the legislature to draft a new statute tailored more precisely to the problem of locating unwed fathers. The statute was not left on the books by invalidating it only as applied to unwed fathers who actually proved they could be located. When a presumption is unconstitutionally overbroad, the preferred course of adjudication is to strike it down. See also *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528 (1973); *Stanley* v. *Illinois*, *supra*; *Vlandis* v. *Kline*, 412 U. S. 441, 453–454 (1973); *Carrington* v. *Rash*, 380 U. S. 89 (1965); *Sugarman* v. *Dougall*, 413 U. S. 634, 646–649 (1973); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972); *Levy* v. *Louisiana*, 391 U. S. 68 (1968).

In my view, the Court's remedial approach is both unprecedented in the equal protection area and unwise. This doc-

trinal change of course was not sought by the parties, suggested by the various *amici*, or discussed at oral argument. Moreover, the Court does not persuasively reason its way to its novel remedial holding nor reconsider our prior cases directly on point. Instead, the Court simply asserts that "this is the preferred course of adjudication." Given that this assertion emerges only from today's decision, one can only hope it will not become entrenched in the law without fuller consideration.

V

The Court's opinion approaches the task of principled equal protection adjudication in what I view as precisely the wrong way. The formal label under which an equal protection claim is reviewed is less important than careful identification of the interest at stake and the extent to which society recognizes the classification as an invidious one. Yet in focusing obsessively on the appropriate label to give its standard of review, the Court fails to identify the interests at stake or to articulate the principle that classifications based on mental retardation must be carefully examined to assure they do not rest on impermissible assumptions or false stereotypes regarding individual ability and need. No guidance is thereby given as to when the Court's freewheeling, and potentially dangerous, "rational-basis standard" is to be employed, nor is attention directed to the invidiousness of grouping all retarded individuals together. Moreover, the Court's narrow, as-applied remedy fails to deal adequately with the overbroad presumption that lies at the heart of this case. Rather than leaving future retarded individuals to run the gauntlet of this overbroad presumption, I would affirm the judgment of the Court of Appeals in its entirety and would strike down on its face the provision at issue. I therefore concur in the judgment in part and dissent in part.

Syllabus

SEDIMA, S. P. R. L. *v.* IMREX CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84–648. Argued April 17, 1985—Decided July 1, 1985

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961–1968, which is directed at "racketeering activity"—defined in § 1961(1) to encompass, *inter alia*, acts "indictable" under specific federal criminal provisions, including mail and wire fraud—provides in § 1964(c) for a private civil action to recover treble damages by any person injured in his business or property "by reason of a violation of section 1962." Section 1962(c) prohibits conducting or participating in the conduct of an enterprise "through a pattern of racketeering activity." Petitioner corporation, which had entered into a joint business venture with respondent company and which believed that it was being cheated by alleged overbilling, filed suit in Federal District Court, asserting, *inter alia*, RICO claims against respondent company and two of its officers (also respondents) under § 1964(c) for alleged violations of § 1962(c), based on predicate acts of mail and wire fraud. The court dismissed the RICO counts for failure to state a claim. The Court of Appeals affirmed, holding that under § 1964(c) a RICO plaintiff must allege a "racketeering injury"—an injury "caused by an activity which RICO was designed to deter," not just an injury occurring as a result of the predicate acts themselves—and that the complaint was also defective for not alleging that respondents had been convicted of the predicate acts of mail and wire fraud, or of a RICO violation.

Held:

1. There is no requirement that a private action under § 1964(c) can proceed only against a defendant who has already been convicted of a predicate act or of a RICO violation. A prior-conviction requirement is not supported by RICO's history, its language, or considerations of policy. To the contrary, every indication is that no such requirement exists. Accordingly, the fact that respondents have not been convicted under RICO or the federal mail and wire fraud statutes does not bar petitioner's action. Pp. 488–493.

2. Nor is there any requirement that in order to maintain a private action under § 1964(c) the plaintiff must establish a "racketeering injury," not merely an injury resulting from the predicate acts themselves. A reading of the statute belies any "racketeering injury" requirement. If the defendant engages in a pattern of racketeering activity in a man-

ner forbidden by § 1962, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement. Where the plaintiff alleges each element of a violation of § 1962, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Pp. 493–500.

741 F. 2d 482, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and POWELL, JJ., joined, *post*, p. 500. POWELL, J., filed a dissenting opinion, *post*, p. 523.

Franklyn H. Snitow argued the cause for petitioner. With him on the brief was *William H. Pauley III*.

Richard Eisenberg argued the cause for respondents. With him on the brief were *Alfred Weintraub* and *Joel I. Klein*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *Norman C. Gorsuch* of Alaska, *John Van de Kamp* of California, *Duane Woodard* of Colorado, *Joseph Lieberman* of Connecticut, *Jim Smith* of Florida, *Michael Lilly* of Hawaii, *Jim Jones* of Idaho, *Neil Hartigan* of Illinios, *Linley E. Pearson* of Indiana, *David L. Armstrong* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *Frank J. Kelley* of Michigan, *Edward L. Pittman* of Mississippi, *William L. Webster* of Missouri, *Mike Greely* of Montana, *Brian McKay* of Nevada, *Irwin L. Kimmelman* of New Jersey, *Paul Bardacke* of New Mexico, *Lacy H. Thornburg* of North Carolina, *Nicholas J. Spaeth* of North Dakota, *Anthony Celebrezze* of Ohio, *Michael Turpen* of Oklahoma, *David Fronmayer* of Oregon, *Dennis J. Roberts II* of Rhode Island, *T. Travis Medlock* of South Carolina, *Mark V. Meierhenry* of South Dakota, *W. J. Michael Cody* of Tennessee, *David L. Wilkinson* of Utah, *John J. Easton* of Vermont, *Kenneth O. Eikenberry* of Washington, *Charlie Brown* of West Virginia, *Bronson C. La Follette* of Wisconsin, *Archie G. McClintock* of Wyoming; for the State of New York by *Robert Abrams*, Attorney General, and *Robert Hermann*, Solicitor General; for the City of New York et al. by *Frederick A. O. Schwarz, Jr.*, *James D. Montgomery*, and

JUSTICE WHITE delivered the opinion of the Court.

The Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U. S. C. §§ 1961–1968, provides a private civil action to recover treble damages for injury "by reason of a violation of" its substantive provisions. 18 U. S. C. § 1964(c). The initial dormancy of this provision and its recent greatly increased utilization[1] are now familiar history.[2] In response to what it perceived to be misuse of civil RICO by private plaintiffs, the court below construed § 1964(c) to permit private actions only against defendants who had been convicted on criminal charges, and only where there had occurred a "racketeering injury." While we understand the court's concern over the consequences of an unbridled reading of the statute, we reject both of its holdings.

I

RICO takes aim at "racketeering activity," which it defines as any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, and any "offense" involving bankruptcy or securities

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Barbara W. Mather; and for the County of Suffolk, New York, by *Mark D. Cohen.*

Briefs of *amici curiae* urging affirmance were filed for the Alliance of American Insurers et al. by *James F. Fitzpatrick* and *John M. Quinn;* for the American Institute of Certified Public Accountants by *Philip A. Lacovara, Jay Kelly Wright, Kenneth J. Bialkin,* and *Louis A. Craco;* and for the Securities Industry Association by *Joel W. Sternman, Eugene A. Gaer,* and *William J. Fitzpatrick.*

[1] Of 270 District Court RICO decisions prior to this year, only 3% (nine cases) were decided throughout the 1970's, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984. Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 55 (1985) (hereinafter ABA Report); see also *id.*, at 53a (table).

[2] For a thorough bibliography of civil RICO decisions and commentary, see Milner, A Civil RICO Bibliography, 21 C. W. L. R. 409 (1985).

fraud or drug-related activities that is "punishable" under federal law. § 1961(1).[3] Section 1962, entitled "Prohibited Activities," outlaws the use of income derived from a "pattern of racketeering activity" to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce; the acquisition or maintenance of any interest in an enterprise "through" a pattern of racketeering activity;

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[3] RICO defines "racketeering activity" to mean

"(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–2424 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act." 18 U. S. C. § 1961(1) (1982 ed., Supp. III).

conducting or participating in the conduct of an enterprise through a pattern of racketeering activity; and conspiring to violate any of these provisions.[4]

Congress provided criminal penalties of imprisonment, fines, and forfeiture for violation of these provisions. § 1963. In addition, it set out a far-reaching civil enforcement scheme, § 1964, including the following provision for private suits:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." § 1964(c).

In 1979, petitioner Sedima, a Belgian corporation, entered into a joint venture with respondent Imrex Co. to provide electronic components to a Belgian firm. The buyer was to order parts through Sedima; Imrex was to obtain the parts

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[4] In relevant part, 18 U. S. C. § 1962 provides:

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

"(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

in this country and ship them to Europe. The agreement called for Sedima and Imrex to split the net proceeds. Imrex filled roughly $8 million in orders placed with it through Sedima. Sedima became convinced, however, that Imrex was presenting inflated bills, cheating Sedima out of a portion of its proceeds by collecting for nonexistent expenses.

In 1982, Sedima filed this action in the Federal District Court for the Eastern District of New York. The complaint set out common-law claims of unjust enrichment, conversion, and breach of contract, fiduciary duty, and a constructive trust. In addition, it asserted RICO claims under § 1964(c) against Imrex and two of its officers. Two counts alleged violations of § 1962(c), based on predicate acts of mail and wire fraud. See 18 U. S. C. §§ 1341, 1343, 1961(1)(B). A third count alleged a conspiracy to violate § 1962(c). Claiming injury of at least $175,000, the amount of the alleged overbilling, Sedima sought treble damages and attorney's fees.

The District Court held that for an injury to be "by reason of a violation of section 1962," as required by § 1964(c), it must be somehow different in kind from the direct injury resulting from the predicate acts of racketeering activity. 574 F. Supp. 963 (1983). While not choosing a precise formulation, the District Court held that a complaint must allege a "RICO-type injury," which was either some sort of distinct "racketeering injury," or a "competitive injury." It found "no allegation here of any injury apart from that which would result directly from the alleged predicate acts of mail fraud and wire fraud," *id.*, at 965, and accordingly dismissed the RICO counts for failure to state a claim.

A divided panel of the Court of Appeals for the Second Circuit affirmed. 741 F. 2d 482 (1984). After a lengthy review of the legislative history, it held that Sedima's complaint was defective in two ways. First, it failed to allege an injury "by reason of a violation of section 1962." In the court's view,

this language was a limitation on standing, reflecting Congress' intent to compensate victims of "certain specific kinds of organized criminality," not to provide additional remedies for already compensable injuries. *Id.*, at 494. Analogizing to the Clayton Act, which had been the model for § 1964(c), the court concluded that just as an antitrust plaintiff must allege an "antitrust injury," so a RICO plaintiff must allege a "racketeering injury"—an injury "different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." *Id.*, at 496. Sedima had failed to allege such an injury.

The Court of Appeals also found the complaint defective for not alleging that the defendants had already been criminally convicted of the predicate acts of mail and wire fraud, or of a RICO violation. This element of the civil cause of action was inferred from § 1964(c)'s reference to a "violation" of § 1962, the court also observing that its prior-conviction requirement would avoid serious constitutional difficulties, the danger of unfair stigmatization, and problems regarding the standard by which the predicate acts were to be proved.

The decision below was one episode in a recent proliferation of civil RICO litigation within the Second Circuit[5] and

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[5] The day after the decision in this case, another divided panel of the Second Circuit reached a similar conclusion. *Bankers Trust Co.* v. *Rhoades*, 741 F. 2d 511 (1984), cert. pending, No. 84–657. It held that § 1964(c) allowed recovery only for injuries resulting not from the predicate acts, but from the fact that they were part of a *pattern*. "If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern," and cannot recover. *Id.*, at 517 (emphasis in original).

The following day, a third panel of the same Circuit, this time unanimous, decided *Furman* v. *Cirrito*, 741 F. 2d 524 (1984), cert. pending, No. 84–604. In that case, the District Court had dismissed the complaint for failure to allege a distinct racketeering injury. The Court of Appeals affirmed, relying on the opinions in *Sedima* and *Bankers Trust*, but wrote

in other Courts of Appeals.[6] In light of the variety of approaches taken by the lower courts and the importance of the issues, we granted certiorari. 469 U. S. 1157 (1984). We now reverse.

II

As a preliminary matter, it is worth briefly reviewing the legislative history of the private treble-damages action. RICO formed Title IX of the Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 922. The civil remedies in the bill passed by the Senate, S. 30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and

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at some length to record its disagreement with those decisions. The panel would have required no injury beyond that resulting from the predicate acts.

[6] A month after the trio of Second Circuit opinions was released, the Eighth Circuit decided *Alexander Grant & Co.* v. *Tiffany Industries, Inc.*, 742 F. 2d 408 (1984), cert. pending, Nos. 84–1084, 84–1222. Viewing its decision as contrary to *Sedima* but consistent with, though broader than, *Bankers Trust*, the court held that a RICO claim does require some unspecified element beyond the injury flowing directly from the predicate acts. At the same time, it stood by a prior decision that had rejected any requirement that the injury be solely commercial or competitive, or that the defendants be involved in organized crime. 742 F. 2d, at 413; see *Bennett* v. *Berg*, 685 F. 2d 1053, 1058–1059, 1063–1064 (CA8 1982), aff'd in part and rev'd in part, 710 F. 2d 1361 (en banc), cert. denied, 464 U. S. 1008 (1983).

Two months later, the Seventh Circuit decided *Haroco, Inc.* v. *American National Bank & Trust Co. of Chicago*, 747 F. 2d 384 (1984), aff'd, *post*, p. 606. Dismissing *Sedima* as the resurrection of the discredited requirement of an organized crime nexus, and *Bankers Trust* as an emasculation of the treble-damages remedy, the Seventh Circuit rejected "the elusive racketeering injury requirement." 747 F. 2d, at 394, 398–399. The Fifth Circuit had taken a similar position. *Alcorn County* v. *U. S. Interstate Supplies, Inc.*, 731 F. 2d 1160, 1169 (1984).

The requirement of a prior RICO conviction was rejected in *Bunker Ramo Corp.* v. *United Business Forms, Inc.*, 713 F. 2d 1272, 1286–1287 (CA7 1983), and *USACO Coal Co.* v. *Carbomin Energy, Inc.*, 689 F. 2d 94 (CA6 1982). See also *United States* v. *Cappetto*, 502 F. 2d 1351 (CA7 1974), cert. denied, 420 U. S. 925 (1975) (civil action by Government).

(d). Previous versions of the legislation, however, had provided for a private treble-damages action in exactly the terms ultimately adopted in § 1964(c). See S. 1623, 91st Cong., 1st Sess., § 4(a) (1969); S. 2048 and S. 2049, 90th Cong., 1st Sess. (1967).

During hearings on S. 30 before the House Judiciary Committee, Representative Steiger proposed the addition of a private treble-damages action "similar to the private damage remedy found in the anti-trust laws. . . . [T]hose who have been wronged by organized crime should at least be given access to a legal remedy. In addition, the availability of such a remedy would enhance the effectiveness of title IX's prohibitions." Hearings on S. 30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 520 (1970) (hereinafter House Hearings). The American Bar Association also proposed an amendment "based upon the concept of Section 4 of the Clayton Act." *Id.*, at 543–544, 548, 559; see 116 Cong. Rec. 25190–25191 (1970). See also H. R. 9327, 91st Cong., 1st Sess. (1969) (House counterpart to S. 1623).

Over the dissent of three members, who feared the treble-damages provision would be used for malicious harassment of business competitors, the Committee approved the amendment. H. R. Rep. No. 91–1549, pp. 58, 187 (1970). In summarizing the bill on the House floor, its sponsor described the treble-damages provision as "another example of the antitrust remedy being adapted for use against organized criminality." 116 Cong. Rec. 35295 (1970). The full House then rejected a proposal to create a complementary treble-damages remedy for those injured by being named as defendants in malicious private suits. *Id.*, at 35342. Representative Steiger also offered an amendment that would have allowed private injunctive actions, fixed a statute of limitations, and clarified venue and process requirements. *Id.*, at 35346; see *id.*, at 35226–35227. The proposal was greeted with some hostility because it had not been reviewed in Com-

mittee, and Steiger withdrew it without a vote being taken. *Id.*, at 35346–35347. The House then passed the bill, with the treble-damages provision in the form recommended by the Committee. *Id.*, at 35363–35364.

The Senate did not seek a conference and adopted the bill as amended in the House. *Id.*, at 36296. The treble-damages provision had been drawn to its attention while the legislation was still in the House, and had received the endorsement of Senator McClellan, the sponsor of S. 30, who was of the view that the provision would be "a major new tool in extirpating the baneful influence of organized crime in our economic life." *Id.*, at 25190.

III

The language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction. The word "conviction" does not appear in any relevant portion of the statute. See §§ 1961, 1962, 1964(c). To the contrary, the predicate acts involve conduct that is "chargeable" or "indictable," and "offense[s]" that are "punishable," under various criminal statutes. § 1961(1). As defined in the statute, racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be. See also S. Rep. No. 91–617, p. 158 (1969): "a racketeering activity . . . must be an act in itself *subject to* criminal sanction" (emphasis added). Thus, a prior-conviction requirement cannot be found in the definition of "racketeering activity." Nor can it be found in § 1962, which sets out the statute's substantive provisions. Indeed, if either § 1961 or § 1962 did contain such a requirement, a prior conviction would also be a prerequisite, nonsensically, for a criminal prosecution, or for a civil action by the Government to enjoin violations that had not yet occurred.

The Court of Appeals purported to discover its prior-conviction requirement in the term "violation" in § 1964(c). 741 F. 2d, at 498–499. However, even if that term were

read to refer to a criminal conviction, it would require a conviction under RICO, not of the predicate offenses. That aside, the term "violation" does not imply a criminal conviction. See *United States* v. *Ward*, 448 U. S. 242, 249–250 (1980). It refers only to a failure to adhere to legal requirements. This is its indisputable meaning elsewhere in the statute. Section 1962 renders certain conduct "unlawful"; § 1963 and § 1964 impose consequences, criminal and civil, for "violations" of § 1962. We should not lightly infer that Congress intended the term to have wholly different meanings in neighboring subsections.[7]

The legislative history also undercuts the reading of the court below. The clearest current in that history is the reliance on the Clayton Act model, under which private and governmental actions are entirely distinct. *E. g.*, *United States* v. *Borden Co.*, 347 U. S. 514, 518–519 (1954).[8] The only

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[7] When Congress intended that the defendant have been previously convicted, it said so. Title 18 U. S. C. § 1963(f) (1982 ed., Supp. III) states that "[u]pon conviction of a person under this section," his forfeited property shall be seized. Likewise, in Title X of the same legislation Congress explicitly required prior convictions, rather than prior criminal activity, to support enhanced sentences for special offenders. See 18 U. S. C. § 3575(e).

[8] The court below considered it significant that § 1964(c) requires a "violation of section 1962," whereas the Clayton Act speaks of "anything forbidden in the antitrust laws." 741 F. 2d, at 488; see 15 U. S. C. § 15(a). The court viewed this as a deliberate change indicating Congress' desire that the underlying conduct not only be forbidden, but also have led to a criminal conviction. There is nothing in the legislative history to support this interpretation, and we cannot view this minor departure in wording, without more, to indicate a fundamental departure in meaning. Representative Steiger, who proposed this wording in the House, nowhere indicated a desire to depart from the antitrust model in this regard. See 116 Cong. Rec. 35227, 35246 (1970). To the contrary, he viewed the treble-damages provision as a "parallel private remedy." *Id.*, at 27739 (letter to House Judiciary Committee). Likewise, Senator Hruska's discussion of his identically worded proposal gives no hint of any such intent. See 115 Cong. Rec. 6993 (1969). In any event, the change in language does not support

specific reference in the legislative history to prior convictions of which we are aware is an objection that the treble-damages provision is too broad precisely because "there need *not* be a conviction under any of these laws for it to be racketeering." 116 Cong. Rec. 35342 (1970) (emphasis added). The history is otherwise silent on this point and contains nothing to contradict the import of the language appearing in the statute. Had Congress intended to impose this novel requirement, there would have been at least some mention of it in the legislative history, even if not in the statute.

The Court of Appeals was of the view that its narrow construction of the statute was essential to avoid intolerable practical consequences.[9] First, without a prior conviction to rely on, the plaintiff would have to prove commission of the predicate acts beyond a reasonable doubt. This would require instructing the jury as to different standards of proof for different aspects of the case. To avoid this awkward-

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the court's drastic inference. It seems more likely that the language was chosen because it is more succinct than that in the Clayton Act, and is consistent with the neighboring provisions. See §§ 1963(a), 1964(a).

[9] It is worth bearing in mind that the holding of the court below is not without problematic consequences of its own. It arbitrarily restricts the availability of private actions, for lawbreakers are often not apprehended and convicted. Even if a conviction has been obtained, it is unlikely that a private plaintiff will be able to recover for all of the acts constituting an extensive "pattern," or that multiple victims will all be able to obtain redress. This is because criminal convictions are often limited to a small portion of the actual or possible charges. The decision below would also create peculiar incentives for plea bargaining to non-predicate-act offenses so as to ensure immunity from a later civil suit. If nothing else, a criminal defendant might plead to a tiny fraction of counts, so as to limit future civil liability. In addition, the dependence of potential civil litigants on the initiation and success of a criminal prosecution could lead to unhealthy private pressures on prosecutors and to self-serving trial testimony, or at least accusations thereof. Problems would also arise if some or all of the convictions were reversed on appeal. Finally, the compelled wait for the completion of criminal proceedings would result in pursuit of stale claims, complex statute of limitations problems, or the wasteful splitting of actions, with resultant claim and issue preclusion complications.

ness, the court inferred that the criminality must already be established, so that the civil action could proceed smoothly under the usual preponderance standard.

We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. See, *e. g.*, *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354 (1984); *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 235 (1972); *Helvering* v. *Mitchell*, 303 U. S. 391, 397 (1938); *United States* v. *Regan*, 232 U. S. 37, 47–49 (1914). There is no indication that Congress sought to depart from this general principle here. See Measures Relating to Organized Crime, Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 388 (1969) (statement of Assistant Attorney General Wilson); House Hearings, at 520 (statement of Rep. Steiger); *id.*, at 664 (statement of Rep. Poff); 116 Cong. Rec. 35313 (1970) (statement of Rep. Minish). That the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction. Cf. *United States* v. *Ward*, *supra*, at 248–251. But we need not decide the standard of proof issue today. For even if the stricter standard is applicable to a portion of the plaintiff's proof, the resulting logistical difficulties, which are accepted in other contexts, would not be so great as to require invention of a requirement that cannot be found in the statute and that Congress, as even the Court of Appeals had to concede, 741 F. 2d, at 501, did not envision.[10]

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[10] The Court of Appeals also observed that allowing civil suits without prior convictions "would make a hash" of the statute's liberal-construction requirement. 741 F. 2d, at 502; see RICO § 904(a). Since criminal

The court below also feared that any other construction would raise severe constitutional questions, as it "would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation 'racketeer,' authorize the award of damages which are clearly punitive, including attorney's fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law." *Id.*, at 500, n. 49. We do not view the statute as being so close to the constitutional edge. As noted above, the fact that conduct can result in both criminal liability and treble damages does not mean that there is not a bona fide civil action. The familiar provisions for both criminal liability and treble damages under the antitrust laws indicate as much. Nor are attorney's fees "clearly punitive." Cf. 42 U. S. C. § 1988. As for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings. Furthermore, requiring conviction of the predicate acts would not protect against an unfair imposition of the "racketeer" label. If there is a problem with thus stigmatizing a garden variety defrauder by means of a civil action, it is not reduced by making certain that the defendant is guilty of *fraud* beyond a reasonable doubt. Finally, to the extent an

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statutes must be strictly construed, the court reasoned, allowing liberal construction of RICO—an approach often justified on the ground that the conduct for which liability is imposed is "already criminal"—would only be permissible if there already existed criminal convictions. Again, we have doubts about the premise of this rather convoluted argument. The strict-construction principle is merely a guide to statutory interpretation. Like its identical twin, the "rule of lenity," it "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan* v. *United States*, 364 U. S. 587, 596 (1961); see also *United States* v. *Turkette*, 452 U. S. 576, 587–588 (1981). But even if that principle has some application, it does not support the court's holding. The strict- and liberal-construction principles are not mutually exclusive; § 1961 and § 1962 can be strictly construed without adopting that approach to § 1964(c). Cf. *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 443, n. 19 (1978). Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident.

action under § 1964(c) might be considered quasi-criminal, requiring protections normally applicable only to criminal proceedings, cf. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965), the solution is to provide those protections, not to ensure that they were previously afforded by requiring prior convictions.[11]

Finally, we note that a prior-conviction requirement would be inconsistent with Congress' underlying policy concerns. Such a rule would severely handicap potential plaintiffs. A guilty party may escape conviction for any number of reasons—not least among them the possibility that the Government itself may choose to pursue only civil remedies. Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps. Cf. *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 344 (1979). This purpose would be largely defeated, and the need for treble damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice. See also n. 9, *supra*.

In sum, we can find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble-damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indication is that no such requirement exists. Accordingly, the fact that Imrex and the individual defendants have not been convicted under RICO or the federal mail and wire fraud statutes does not bar Sedima's action.

IV

In considering the Court of Appeals' second prerequisite for a private civil RICO action—"injury . . . caused by an

[11] Even were the constitutional questions more significant, any doubts would be insufficient to overcome the mandate of the statute's language and history. "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." *United States* v. *Albertini*, 472 U. S. 675, 680 (1985).

activity which RICO was designed to deter"—we are somewhat hampered by the vagueness of that concept. Apart from reliance on the general purposes of RICO and a reference to "mobsters," the court provided scant indication of what the requirement of racketeering injury means. It emphasized Congress' undeniable desire to strike at organized crime, but acknowledged and did not purport to overrule Second Circuit precedent rejecting a requirement of an organized crime nexus. 741 F. 2d, at 492; see *Moss* v. *Morgan Stanley, Inc.*, 719 F. 2d 5, 21 (CA2 1983), cert. denied *sub nom. Moss* v. *Newman*, 465 U. S. 1025 (1984). The court also stopped short of adopting a "competitive injury" requirement; while insisting that the plaintiff show "the kind of economic injury which has an effect on competition," it did not require "actual anticompetitive effect." 741 F. 2d, at 496; see also *id.*, at 495, n. 40.

The court's statement that the plaintiff must seek redress for an injury caused by conduct that RICO was designed to deter is unhelpfully tautological. Nor is clarity furnished by a negative statement of its rule: standing is not provided by the injury resulting from the predicate acts themselves. That statement is itself apparently inaccurate when applied to those predicate acts that unmistakably constitute the kind of conduct Congress sought to deter. See *id.*, at 496, n. 41. The opinion does not explain how to distinguish such crimes from the other predicate acts Congress has lumped together in § 1961(1). The court below is not alone in struggling to define "racketeering injury," and the difficulty of that task itself cautions against imposing such a requirement.[12]

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[12] The decision below does not appear identical to *Bankers Trust*. It established a standing requirement, whereas *Bankers Trust* adopted a limitation on damages. The one focused on the mobster element, the other took a more conceptual approach, distinguishing injury caused by the individual acts from injury caused by their cumulative effect. Thus, the Eighth Circuit has indicated its agreement with *Bankers Trust* but not

We need not pinpoint the Second Circuit's precise holding, for we perceive no distinct "racketeering injury" requirement. Given that "racketeering activity" consists of no more and no less than commission of a predicate act, § 1961(1), we are initially doubtful about a requirement of a "racketeering injury" separate from the harm from the predicate acts. A reading of the statute belies any such requirement. Section 1964(c) authorizes a private suit by "[a]ny person injured in his business or property by reason of a violation of § 1962." Section 1962 in turn makes it unlawful for "any person"—not just mobsters—to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. §§ 1962(a)–(c). If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement.[13]

Sedima. *Alexander Grant & Co.* v. *Tiffany Industries, Inc.*, 742 F. 2d, at 413. See also *Haroco, Inc.* v. *American National Bank & Trust Co. of Chicago*, 747 F. 2d, at 396. The two tests were described as "very different" by the ABA Task Force. See ABA Report, at 310.

Yet the *Bankers Trust* court itself did not seem to think it was departing from *Sedima*, see 741 F. 2d, at 516–517, and other Second Circuit panels have treated the two decisions as consistent, see *Furman* v. *Cirrito*, 741 F. 2d 524 (1984), cert. pending, No. 84–604; *Durante Brothers & Sons, Inc.* v. *Flushing National Bank*, 755 F. 2d 239, 246 (1985). The evident difficulty in discerning just what the racketeering injury requirement consists of would make it rather hard to apply in practice or explain to a jury.

[13] Given the plain words of the statute, we cannot agree with the court below that Congress could have had no "inkling of [§ 1964(c)'s] implications." 741 F. 2d, at 492. Congress' "inklings" are best determined by the statutory language that it chooses, and the language it chose here extends far beyond the limits drawn by the Court of Appeals. Nor does the "clanging silence" of the legislative history, *ibid.*, justify those limits. For one thing, § 1964(c) did not pass through Congress unnoticed. See Part II,

A violation of § 1962(c), the section on which Sedima relies, requires (1) conduct (2) of an enterprise (3) through a pattern[14] (4) of racketeering activity. The plaintiff must, of course, allege each of these elements to state a claim. Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of § 1962, nor is mere commission of the predicate offenses. In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. As the Seventh Circuit has stated, "[a] defendant who violates section 1962 is not liable

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supra. In addition, congressional silence, no matter how "clanging," cannot override the words of the statute.

[14] As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship . . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U. S. C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. *Iannelli* v. *United States*, 420 U. S. 770, 789 (1975).

for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Haroco, Inc.* v. *American National Bank & Trust Co. of Chicago*, 747 F. 2d 384, 398 (1984), aff'd, *post*, p. 606.

But the statute requires no more than this. Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in § 1962(c), "an activity which RICO was designed to deter." Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.[15]

This less restrictive reading is amply supported by our prior cases and the general principles surrounding this statute. RICO is to be read broadly. This is the lesson not only

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[15] Such damages include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery. See *post*, at 521–522. Under the dissent's reading of the statute, the harm proximately caused by the forbidden conduct is not compensable, but that ultimately and indirectly flowing therefrom is. We reject this topsy-turvy approach, finding no warrant in the language or the history of the statute for denying recovery thereunder to "the direct victims of the [racketeering] activity," *post*, at 522, while preserving it for the indirect. Even the court below was not that grudging. It would apparently have allowed recovery for both the direct and the ultimate harm flowing from the defendant's conduct, requiring injury "not *simply* caused by the predicate acts, but *also* caused by an activity which RICO was designed to deter." 741 F. 2d, at 496 (emphasis added).

The dissent would also go further than did the Second Circuit in its requirement that the plaintiff have suffered a competitive injury. Again, as the court below stated, Congress "nowhere suggested that actual anticompetitive effect is required for suits under the statute." *Ibid.* The language it chose, allowing recovery to "[a]ny person injured in his business *or property*," § 1964(c) (emphasis added), applied to this situation, suggests that the statute is not so limited.

of Congress' self-consciously expansive language and overall approach, see *United States* v. *Turkette*, 452 U. S. 576, 586–587 (1981), but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub. L. 91–452, § 904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity. See also n. 10, *supra*. Far from effectuating these purposes, the narrow readings offered by the dissenters and the court below would in effect eliminate § 1964(c) from the statute.

RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime. See generally *Russello* v. *United States*, 464 U. S. 16, 26–29 (1983). While few of the legislative statements about novel remedies and attacking crime on all fronts, see *ibid.*, were made with direct reference to § 1964(c), it is in this spirit that all of the Act's provisions should be read. The specific references to § 1964(c) are consistent with this overall approach. Those supporting § 1964(c) hoped it would "enhance the effectiveness of title IX's prohibitions," House Hearings, at 520, and provide "a major new tool," 116 Cong. Rec. 35227 (1970). See also *id.*, at 25190; 115 Cong. Rec. 6993–6994 (1969). Its opponents, also recognizing the provision's scope, complained that it provided too easy a weapon against "innocent businessmen," H. R. Rep. No. 91–1549, p. 187 (1970), and would be prone to abuse, 116 Cong. Rec. 35342 (1970). It is also significant that a previous proposal to add RICO-like provisions to the Sherman Act had come to grief in part precisely because it "could create inappropriate and unnecessary obstacles in the way of . . . a private litigant [who] would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as 'standing to sue' and 'proximate cause.'" 115 Cong. Rec. 6995 (1969) (ABA comments on S. 2048); see also *id.*, at 6993 (S. 1623 proposed as an amendment to Title 18 to avoid these problems). In borrowing its "racketeering

injury" requirement from antitrust standing principles, the court below created exactly the problems Congress sought to avoid.

Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. 741 F. 2d, at 487. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" *Ibid.* Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. *United States* v. *Turkette*, *supra*. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the "ambiguity" discovered by the court below. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Haroco, Inc.* v. *American National Bank & Trust Co. of Chicago*, *supra*, at 398.

It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypal, intimidating mobster.[16] Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations

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[16] The ABA Task Force found that of the 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% common-law fraud in a commercial or business setting, and only 9% "allegations of criminal activity of a type generally associated with professional criminals." ABA Report, at 55–56. Another survey of 132 published decisions found that 57 involved securities transactions and 38 commercial and contract disputes, while no other category made it into double figures. American Institute of Certified Public Accountants, The Authority to Bring Private Treble-Damage Suits Under "RICO" Should be Removed 13 (Oct. 10, 1984).

where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.

We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. See generally ABA Report, at 55–69. Though sharing the doubts of the Court of Appeals about this increasing divergence, we cannot agree with either its diagnosis or its remedy. The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern." We do not believe that the amorphous standing requirement imposed by the Second Circuit effectively responds to these problems, or that it is a form of statutory amendment appropriately undertaken by the courts.

V

Sedima may maintain this action if the defendants conducted the enterprise through a pattern of racketeering activity. The questions whether the defendants committed the requisite predicate acts, and whether the commission of those acts fell into a pattern, are not before us. The complaint is not deficient for failure to allege either an injury separate from the financial loss stemming from the alleged acts of mail and wire fraud, or prior convictions of the defendants. The judgment below is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE POWELL join, dissenting.*

The Court today recognizes that "in its private civil version, RICO is evolving into something quite different from

*[This opinion applies also to No. 84–822, *American National Bank & Trust Company of Chicago et al.* v. *Haroco, Inc., et al, post,* p. 606.]

the original conception of its enactors." *Ante*, at 500. The Court, however, expressly validates this result, imputing it to the manner in which the statute was drafted. I fundamentally disagree both with the Court's reading of the statute and with its conclusion. I believe that the statutory language and history disclose a narrower interpretation of the statute that fully effectuates Congress' purposes, and that does not make compensable under civil RICO a host of claims that Congress never intended to bring within RICO's purview.

I

The Court's interpretation of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions. We do not lightly infer a congressional intent to effect such fundamental changes. To infer such intent here would be untenable, for there is no indication that Congress even considered, much less approved, the scheme that the Court today defines.

The single most significant reason for the expansive use of civil RICO has been the presence in the statute, as predicate acts, of mail and wire fraud violations. See 18 U. S. C. § 1961(1) (1982 ed., Supp. III). Prior to RICO, no federal statute had expressly provided a private damages remedy based upon a violation of the mail or wire fraud statutes, which make it a federal crime to use the mail or wires in furtherance of a scheme to defraud. See 18 U. S. C. §§ 1341, 1343. Moreover, the Courts of Appeals consistently had held that no implied federal private causes of action accrue to victims of these federal violations. See, *e. g.*, *Ryan* v. *Ohio Edison Co.*, 611 F. 2d 1170, 1178–1179 (CA6 1979) (mail fraud); *Napper* v. *Anderson, Henley, Shields, Bradford & Pritchard*, 500 F. 2d 634, 636 (CA5 1974) (wire fraud), cert. denied, 423 U. S. 837 (1975). The victims normally were restricted to bringing actions in state court under common-law fraud theories.

Under the Court's opinion today, two fraudulent mailings or uses of the wires occurring within 10 years of each other might constitute a "pattern of racketeering activity," § 1961 (5), leading to civil RICO liability. See § 1964(c). The effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering, because in recent years the Courts of Appeals have "tolerated an extraordinary expansion of mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was subject only to state criminal and civil law." *United States* v. *Weiss*, 752 F. 2d 777, 791 (CA2 1985) (Newman, J., dissenting). In bringing criminal actions under those statutes, prosecutors need not show either a substantial connection between the scheme to defraud and the mail and wire fraud statutes, see *Pereira* v. *United States*, 347 U. S. 1, 8 (1954), or that the fraud involved money or property. Courts have sanctioned prosecutions based on deprivations of such intangible rights as a shareholder's right to "material" information, *United States* v. *Siegel*, 717 F. 2d 9, 14–16 (CA2 1983); a client's right to the "undivided loyalty" of his attorney, *United States* v. *Bronston*, 658 F. 2d 920, 927 (CA2 1981), cert. denied, 456 U. S. 915 (1982); an employer's right to the honest and faithful service of his employees, *United States* v. *Bohonus*, 628 F. 2d 1167, 1172 (CA9), cert. denied, 447 U. S. 928 (1980); and a citizen's right to know the nature of agreements entered into by the leaders of political parties, *United States* v. *Margiotta*, 688 F. 2d 108, 123–125 (CA2 1982), cert. denied, 461 U. S. 913 (1983).

The only restraining influence on the "inexorable expansion of the mail and wire fraud statutes," *United States* v. *Siegel*, *supra*, at 24 (Winter, J., dissenting in part and concurring in part), has been the prudent use of prosecutorial discretion. Prosecutors simply do not invoke the mail and wire fraud provisions in every case in which a violation of the relevant statute can be proved. See U. S. Dept. of Justice, United States Attorney's Manual § 9–43.120 (Feb. 16, 1984).

For example, only where the scheme is directed at a "class of persons or the general public" and includes "a substantial pattern of conduct," will "serious consideration . . . be given to [mail fraud] prosecution." In all other cases, "the parties should be left to settle their differences by civil or criminal litigation in the state courts." *Ibid.*

The responsible use of prosecutorial discretion is particularly important with respect to criminal RICO prosecutions—which often rely on mail and wire fraud as predicate acts—given the extremely severe penalties authorized by RICO's criminal provisions. Federal prosecutors are therefore instructed that "[u]tilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application." *Id.*, § 9–110.200 (Mar. 9, 1984). The Justice Department itself recognizes that a broad interpretation of the criminal RICO provisions would violate "the principle that the primary responsibility for enforcing state laws rests with the state concerned." *Ibid.* Specifically, the Justice Department will not bring RICO prosecutions unless the pattern of racketeering activity required by 18 U. S. C. § 1962 has "some relation to the purpose of the enterprise." United States Attorney's Manual § 9–110.350 (Mar. 9, 1984).

Congress was well aware of the restraining influence of prosecutorial discretion when it enacted the criminal RICO provisions. It chose to confer broad statutory authority on the Executive fully expecting that this authority would be used only in cases in which its use was warranted. See Measures Relating to Organized Crime: Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 346–347, 424 (1969) (hereinafter cited as Senate Hearings). Moreover, in seeking a broad interpretation of RICO from this Court in *United States* v. *Turkette*, 452 U. S. 576 (1981), the Government stressed that no "extreme cases" would be brought because the Justice Department would ex-

ercise "sound discretion" through a centralized review process. See Brief for United States in No. 80–808, O. T. 1980, p. 25, n. 20.

In the context of civil RICO, however, the restraining influence of prosecutors is completely absent. Unlike the Government, private litigants have no reason to avoid displacing state common-law remedies. Quite to the contrary, such litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud. Then the defendant, facing a tremendous financial exposure in addition to the threat of being labeled a "racketeer," will have a strong interest in settling the dispute. See Rakoff, Some Personal Reflections on the Sedima Case and on Reforming RICO, in RICO: Civil and Criminal 400 (Law Journal Seminars-Press 1984). The civil RICO provision consequently stretches the mail and wire fraud statutes to their absolute limits and federalizes important areas of civil litigation that until now were solely within the domain of the States.

In addition to altering fundamentally the federal-state balance in civil remedies, the broad reading of the civil RICO provision also displaces important areas of federal law. For example, one predicate offense under RICO is "fraud in the sale of securities." 18 U. S. C. § 1961(1) (1982 ed., Supp. III). By alleging two instances of such fraud, a plaintiff might be able to bring a case within the scope of the civil RICO provision. It does not take great legal insight to realize that such a plaintiff would pursue his case under RICO rather than do so solely under the Securities Act of 1933 or the Securities Exchange Act of 1934, which provide both express and implied causes of action for violations of the federal securities laws. Indeed, the federal securities laws contemplate only compensatory damages and ordinarily do not authorize recovery of attorney's fees. By invoking RICO, in contrast, a suc-

cessful plaintiff will recover both treble damages and attorney's fees.

More importantly, under the Court's interpretation, the civil RICO provision does far more than just increase the available damages. In fact, it virtually eliminates decades of legislative and judicial development of private civil remedies under the federal securities laws. Over the years, courts have paid close attention to matters such as standing, culpability, causation, reliance, and materiality, as well as the definitions of "securities" and "fraud." See, *e. g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975) (purchaser/seller requirement). All of this law is now an endangered species because plaintiffs can avoid the limitations of the securities laws merely by alleging violations of other predicate acts. For example, even in cases in which the investment instrument is not a "security" covered by the federal securities laws, RICO will provide a treble-damages remedy to a plaintiff who can prove the required pattern of mail or wire fraud. Cf. *Crocker National Bank* v. *Rockwell International Corp.*, 555 F. Supp. 47 (ND Cal. 1982). Before RICO, of course, the plaintiff could not have recovered under federal law for the mail or wire fraud violation.

Similarly, a customer who refrained from selling a security during a period in which its market value was declining could allege that, on two occasions, his broker recommended by telephone, as part of a scheme to defraud, that the customer not sell the security. The customer might thereby prevail under civil RICO even though, as neither a purchaser nor a seller, he would not have had standing to bring an action under the federal securities laws. See also 741 F. 2d 482, 499 (1984) ("two misstatements in a proxy solicitation could subject any director in any national corporation to 'racketeering' charges and the threat of treble damages and attorneys' fees").

The effect of civil RICO on federal remedial schemes is not limited to the securities laws. For example, even though

commodities fraud is not a predicate offense listed in § 1961, the carefully crafted private damages causes of action under the Commodity Exchange Act may be circumvented in a commodities case through civil RICO actions alleging mail or wire fraud. See, *e. g.*, *Parnes* v. *Heinold Commodities, Inc.*, 487 F. Supp. 645 (ND Ill. 1980). The list goes on and on.

The dislocations caused by the Court's reading of the civil RICO provision are not just theoretical. In practice, this provision frequently has been invoked against legitimate businesses in ordinary commercial settings. As the Court recognizes, the ABA Task Force that studied civil RICO found that 40% of the reported cases involved securities fraud and 37% involved common-law fraud in a commercial or business setting. See *ante*, at 499, n. 16. Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat. Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 69 (1985) (hereinafter cited as ABA Report).

Only 9% of all civil RICO cases have involved allegations of criminal activity normally associated with professional criminals. See *ante*, at 499, n. 16. The central purpose that Congress sought to promote through civil RICO is now a mere footnote.

In summary, in both theory and practice, civil RICO has brought profound changes to our legal landscape. Undoubtedly, Congress has the power to federalize a great deal of state common law, and there certainly are no relevant constraints on its ability to displace federal law. Those, however, are not the questions that we face in this case. What we have to decide here, instead, is whether Congress in fact intended to produce these far-reaching results.

Established canons of statutory interpretation counsel against the Court's reading of the civil RICO provision. First, we do not impute lightly a congressional intention to upset the federal-state balance in the provision of civil remedies as fundamentally as does this statute under the Court's view. For example, in *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462 (1977), we stated that "[a]bsent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities." *Id.*, at 479. Here, with striking nonchalance, the Court does what it declined to do in *Santa Fe Industries*—and much more as well. Second, with respect to effects on the federal securities laws and other federal regulatory statutes, we should be reluctant to displace the well-entrenched federal remedial schemes absent clear direction from Congress. See, *e. g.*, *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U. S. 1, 23–24 (1976); *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 153 (1976).

In this case, nothing in the language of the statute or the legislative history suggests that Congress intended either the federalization of state common law or the displacement of existing federal remedies. Quite to the contrary, all that the statute and the legislative history reveal as to these matters is what Judge Oakes called a "clanging silence," 741 F. 2d, at 492.

Moreover, if Congress had intended to bring about dramatic changes in the nature of commercial litigation, it would at least have paid more than cursory attention to the civil RICO provision. This provision was added in the House of Representatives after the Senate already had passed its version of the RICO bill; the House itself adopted a civil remedy provision almost as an afterthought; and the Senate thereafter accepted the House's version of the bill without even requesting a Conference. See *infra*, at 518–519. Congress simply does not act in this way when it intends to effect fundamental changes in the structure of federal law.

II

The statutory language and legislative history support the view that Congress did not intend to effect a radical alteration of federal civil litigation. In fact, the language and history indicate a congressional intention to limit, in a workable and coherent manner, the type of injury that is compensable under the civil RICO provision. As the following demonstrates, Congress sought to fill an existing gap in civil remedies and to provide a means of compensation that otherwise did not exist for the honest businessman harmed by the economic power of "racketeers."

A

I begin with a review of the statutory language. Section 1964(c) grants a private right of action to any person "injured in his business or property by reason of a violation of section 1962." Section 1962, in turn, makes it unlawful to invest, in an enterprise engaged in interstate commerce, funds "derived . . . from a pattern of racketeering activity," to acquire or operate an interest in any such enterprise through "a pattern of racketeering activity," or to conduct or participate in the conduct of that enterprise "through a pattern of racketeering activity." Section 1961 defines "racketeering activity" to mean any of numerous acts "chargeable" or "indictable" under enumerated state and federal laws, including state-law murder, arson, and bribery statutes, federal mail and wire fraud statutes, and the antifraud provisions of federal securities laws. It states that "a pattern" of racketeering activity requires proof of at least two acts of racketeering within 10 years.

By its terms, § 1964(c) therefore grants a cause of action only to a person injured "by reason of a violation of *§ 1962*." The Court holds today that the only injury a plaintiff need allege is injury occurring by reason of a predicate, or racketeering, act—*i. e.*, one of the offenses listed in § 1961. But § 1964(c) does not by its terms provide a remedy for injury by

reason of *§ 1961;* it requires an injury by reason of *§ 1962.* In other words:

> "While section 1962 prohibits the involvement of an 'enterprise' in 'racketeering activity,' racketeering *itself* is not a violation of § 1962. Thus, a construction of RICO permitting recovery for damages arising out of the racketeering acts simply does not comport with the statute as written by Congress. In effect, the broad construction replaces the rule that treble damages can be recovered only when they occur '*by reason of* a violation of section 1962,' with a rule permitting recovery of treble damages *whenever* there has been a violation of section 1962. Such unwarranted judicial interference with the Act's plain meaning cannot be justified." Comment, 76 Nw. U. L. Rev. 100, 128 (1981) (footnotes omitted).

See also Bridges, Private RICO Litigation Based Upon "Fraud in the Sale of Securities," 18 Ga. L. Rev. 43, 67 (1983).

In addition, the statute permits recovery only for injury to business or property. It therefore excludes recovery for personal injuries. However, many of the predicate acts listed in § 1961 threaten or inflict personal injuries—such as murder and kidnaping. If Congress in fact intended the victims of the predicate acts to recover for their injuries, as the Court holds it did, it is inexplicable why Congress would have limited recovery to business or property injury. It simply makes no sense to allow recovery by some, but not other victims of predicate acts, and to make recovery turn solely on whether the defendant has chosen to inflict personal pain or harm to property in order to accomplish its end.

In summary, the statute clearly contemplates recovery for injury resulting from the confluence of events described in § 1962 and not merely from the commission of a predicate act. The Court's contrary interpretation distorts the statutory language under the guise of adopting a plain-meaning definition, and it does so without offering any indication of congres-

sional intent that justifies a deviation from what I have shown to be the plain meaning of the statute. However, even if the statutory language were ambiguous, see *Haroco, Inc.* v. *American National Bank & Trust Co. of Chicago*, 747 F. 2d 384, 389 (CA7 1984), aff'd, *post*, p. 606, the scope of the civil RICO provision would be no different, for this interpretation of the statute finds strong support in the legislative history of that provision.

B

In reviewing the legislative history of civil RICO, numerous federal courts have become mired in controversy about the extent to which Congress intended to adopt or reject the federal antitrust laws as a model for the RICO provisions. The basis for the dispute among the lower courts is the language of the treble-damages provision, which tracks virtually word for word the treble-damages provision of the antitrust laws, § 4 of the Clayton Act;[1] given this parallel, there can be little doubt that the latter served as a model for the former. Some courts have relied heavily on this congruity to read an antitrust-type "competitive injury" requirement into the civil RICO statute. See, *e. g.*, *North Barrington Development, Inc.* v. *Fanslow*, 547 F. Supp. 207 (ND Ill. 1980). Other courts have rejected a competitive-injury requirement, or any antitrust analogy, relying in significant part on what

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[1] Section 1964(c) provides:

"Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

Section 4 of the Clayton Act, 15 U. S. C. § 15, provides in relevant part:

"[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

they perceive as Congress' rejection of a wholesale adoption of antitrust precedent. See, *e. g.*, *Yancoski* v. *E. F. Hutton & Co., Inc.*, 581 F. Supp. 88 (ED Pa. 1983); *Mauriber* v. *Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1240 (SDNY 1983).

Many of these courts have read far too much into the antitrust analogy. The legislative history makes clear that Congress viewed the form of civil remedies under RICO as analogous to such remedies under the antitrust laws, but that it did not thereby intend the substantive compensable injury to be exactly the same. The legislative history also suggests that Congress might have wanted to avoid saddling the civil RICO provisions with the same standing requirements that at the time limited standing to sue under the antitrust laws. However, the Committee Reports and hearings in no way suggest that Congress considered and rejected a requirement of injury separate from that resulting from the predicate acts. Far from it, Congress offered considerable indication that the kind of injury it primarily sought to attack and compensate was that for which existing civil and criminal remedies were inadequate or nonexistent; the requisite injury is thus akin to, but broader than, that targeted by the antitrust laws and different in kind from that resulting from the underlying predicate acts.

A brief look at the legislative history makes clear that the antitrust laws in no relevant respect constrain our analysis or preclude formulation of an independent RICO-injury requirement. When Senator Hruska first introduced to Congress the predecessor to RICO, he proposed an amendment to the Sherman Act that would have prohibited the investment or use of intentionally unreported income from one line of business to establish, operate, or invest in another line of business. S. 2048, 90th Cong., 1st Sess. (1967). After studying the provision, the American Bar Association issued a report that, while acknowledging the effects of organized crime's infiltration of legitimate business, stated a preference for a

provision separate from the antitrust laws. See 115 Cong. Rec. 6994 (1969). According to the report:

> "By placing the antitrust-type enforcement and recovery procedures in a separate statute, a commingling of criminal enforcement goals with the goals of regulating competition is avoided.
>
> . . . . .
>
> "Moreover, the use of antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as 'standing to sue' and 'proximate cause.'" *Id.*, at 6995.

Congress subsequently decided not to pursue an addition to the antitrust laws but instead to fashion a wholly separate criminal statute. If in fact that decision was made in response to the ABA's statement and not to other political concerns, it may be interpreted at most as a rejection of antitrust *standing* requirements. Court-developed standing rules define the requisite proximity between the plaintiff's injury and the defendant's antitrust violation. See *Blue Shield of Virginia* v. *McCready*, 457 U. S. 465, 476 (1982) (discussing antitrust standing rules developed in the Federal Circuits). Thus, at most we may read the early legislative history to eschew wholesale adoption of the particular nexus requirements that limit the class of potential antitrust plaintiffs. Courts that read this history to bar *any* analogy to the antitrust laws simply read too much into the scant evidence available to us. In particular, courts that read this history to bar an injury requirement akin to "antitrust" injury are in error. The requirement of antitrust injury, as articulated in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977), differs in kind from the standing requirement to

which the ABA referred and, in fact, had not been articulated at the time of the ABA comments.

At the same time, courts that believe civil RICO doctrine should mirror civil antitrust doctrine also read too much into the legislative history. It is absolutely clear that Congress intended to adopt antitrust *remedies*, such as civil actions by the Government and treble damages. The House of Representatives added the civil provision to Title IX in response to suggestions from the ABA and Congressmen that there be a remedy "similar to the private damage remedy found in the anti-trust laws," Organized Crime Control: Hearings on S. 30 and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 520 (1970) (statement of Rep. Steiger) (hereinafter House Hearings); see also *id.*, at 543 (statement of Edward L. Wright, ABA president-elect) (suggesting an amendment "to include the additional civil remedy of authorizing private damage suits based upon the concept of Section 4 of the Clayton (Antitrust) Act"); 116 Cong. Rec. 35295 (1970) (remarks of Rep. Poff, chief spokesman for the bill) (explaining bill's adoption of the antitrust remedy for use against organized crime). The decision to adopt antitrust remedies does not, however, compel the conclusion that Congress intended to adopt substantive antitrust doctrine. Courts that construe these references to the antitrust laws as indications of Congress' intent to adopt the substance of antitrust doctrine also read too much into too little language.

C

While the foregoing establishes that Congress sought to adopt remedies akin to those used in antitrust law—such as civil government enforcement—and to reject antitrust standing rules, other portions of the legislative history reveal just what Congress intended the substantive dimensions of the civil action to be. Quite simply, its principal target was the economic power of racketeers, and its toll on legitimate busi-

nessmen. To this end, Congress sought to fill a gap in the civil and criminal laws and to provide new remedies broader than those already available to private or government antitrust plaintiffs, different from those available to government and private citizens under state and federal laws, and significantly narrower than those adopted by the Court today.

In 1967, Senator Hruska proposed two bills, S. 2048 and S. 2049, 90th Cong., 1st Sess., which were designed in part to implement recommendations of the President's Commission on Law Enforcement and the Administration of Justice (the Katzenbach Commission) on the fight against organized crime. See 113 Cong. Rec. 17998–18001 (1967). The former bill proposed an amendment to the Sherman Act prohibiting the investment or use of unreported income derived from one line of business in another business. *Id.*, at 17999. The latter bill, which was separate from the Sherman Act, prohibited the acquisition of a business interest with income derived from criminal activity. *Ibid.* Representative Poff introduced similar bills in the House of Representatives. See H. R. 11266, H. R. 11268, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 17976 (1967).

Introducing S. 2048, Senator Hruska explained that "[b]y limiting its application to intentionally unreported income, this proposal highlights the fact that *the evil to be curbed is the unfair competitive advantage inherent in the large amount of illicit income available to organized crime.*" *Id.*, at 17999 (emphasis added). He described how organized crime had infiltrated a wide range of businesses, and he observed that "[i]n each of these instances, large amounts of cash coupled with threats of violence, extortion, and similar techniques were utilized by mobsters *to achieve their desired objectives: monopoly control of these enterprises.*" *Id.*, at 17998 (emphasis added). He identified four means by which control of legitimate business had been acquired:

> "First. Investing concealed profits acquired from gambling and other illegal enterprises.

"Second. Accepting business interests in payment of the owner's gambling debts.

"Third. Foreclosing on usurious loans.

"Fourth. Using various forms of extortion." *Id.*, at 17998–17999.

The Senator then explained how this infiltration takes its toll:

"The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment. Force or fear limits choice, ultimately reduces quality, and increases prices. When organized crime moves into a business, it brings all the techniques of violence and intimidation which it used in its illegal businesses. Competitors are eliminated and customers confined to sponsored suppliers. Its effect is even more unwholesome than other monopolies because its position does not rest on economic superiority." *Id.*, at 17999.

Congress never took action on these bills.

In 1969, Senator McClellan introduced the Organized Crime Control Act, which altered numerous criminal law areas such as grand juries, immunity, and sentencing, but which contained no provision like that now known as RICO. See S. 30, 91st Cong., 1st Sess.; 115 Cong. Rec. 769 (1969). Shortly thereafter, Senator Hruska introduced the Criminal Activities Profits Act. S. 1623, 91st Cong., 1st Sess.; 115 Cong. Rec. 6995–6996 (1969). He explained that S. 1623 was designed to synthesize the earlier two bills (S. 2048 and S. 2049) while placing the "unified whole" outside the Sherman Act in response to the ABA's concerns. According to the Senator, the bill was meant to attack "*the economic power of organized crime and its exercise of unfair competition with honest businessmen*," and to address "[t]he power of organized crime to establish a monopoly within numerous business fields" and the impact on the free market and honest

competitors of "a racketeer dominated venture." *Id.*, at 6993 (emphasis added).

As introduced, S. 1623 contained a provision for a private treble-damages action; the language of that provision was virtually identical to that in § 1964(c), and it likely served as the model for § 1964(c). See *id.*, at 6996. Explaining this provision, Senator Hruska said:

> "In addition to this criminal prohibition, the bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman. Despite the willingness of the courts to apply the Sherman Anti-Trust Act to organized crime activities, *as a practical matter the legitimate businessman does not have adequate civil remedies available under that act. This bill fills that gap.*" *Id.*, at 6993 (emphasis added).

The Senate did not act directly on either S. 30 or S. 1623. Instead, Senators McClellan and Hruska jointly introduced S. 1861, the Corrupt Organizations Act of 1969, 91st Cong., 1st Sess.; 115 Cong. Rec. 9568–9571, which combined features of the two other bills and added to them. The new bill expanded the list of offenses that would constitute "racketeering activity" and required that the proscribed conduct be committed through a pattern of "racketeering activity." It did not, however, contain a private civil remedy provision, but only authorization for an injunctive action brought by the Attorney General. Senator McClellan thereafter requested that the provisions of S. 1861 be incorporated by amendment into the broad Organized Crime Control Act, S. 30. See 115 Cong. Rec. 9566–9571 (1969).

In December 1969, the Senate Judiciary Committee reported on the Organized Crime Control Act, S. 30, as amended to include S. 1861 as Title IX, "Racketeer Influenced and Corrupt Organizations." Title IX, it is clear, was

aimed at precisely the same evil that Senator Hruska had targeted in 1967—the infiltration of legitimate business by organized crime. According to the Committee Report, the Title

> "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce. It seeks to achieve this objective by the fashioning of new criminal and civil remedies and investigative procedures." S. Rep. No. 91–617, p. 76 (1969).

In language taken virtually verbatim from the earlier floor statements of Senator Hruska, the Report described the extraordinary range of legitimate businesses and unions that had been infiltrated by racketeers, and the means by which the racketeers sought to profit from the infiltration. It described "scams" involving bankruptcy and insurance fraud, and the use of "force or fear" to secure a monopoly in the service or product of the business, and it summed up: "When the campaign is successful, the organization begins to extract a premium price from customers." *Id.*, at 77.

Similarly, Senator Byrd spoke in favor of Title IX and gave other examples of the "awesome power" of racketeers and their methods of operation. He described, for example, how one racketeer had gained a foothold in a detergent company and then had used arson and murder to try to get the A & P Tea Co. to buy a detergent that A & P had tested and rejected. 116 Cong. Rec. 607 (1970). As another example, he explained that racketeers would corner the market on a good or service and then withhold it from a businessman until he surrendered his business or made some other related economic concession. *Ibid.* In each of these cases, I note, the racketeer engaged in criminal acts in order to accomplish a commercial goal—*e. g.*, to destroy competition, create a monopoly, or infiltrate a legitimate business. See also *id.*, at 602 (statement of Sen. Hruska) ("[Organized crime] employs

physical brutality, fear and corruption to intimidate competitors and customers *to achieve increased sales and profits*") (emphasis added). In sum, "[s]crutiny of the Senate Report . . . establishes without a doubt a single dominating purpose of the Senate in proposing the RICO statute: 'Title IX represents the committee's careful efforts to fashion new remedies to deal with the infiltration of organized crime into legitimate organizations operating in interstate commerce.'" ABA Report 105.

The bill passed the Senate after a short debate by a vote of 73 to 1, without a treble-damages provision, and it was then considered by the House. In hearings before the House Judiciary Committee, it was suggested that the bill should include "the additional civil remedy of authorizing private damage suits based upon the concept of Section 4 of the Clayton Act." House Hearings, at 543–544 (statement of Edward Wright, ABA president-elect); see also *id.*, at 520 (statement of Rep. Steiger) (suggesting addition of a private civil damages remedy). Before reporting the bill favorably in September 1970, the House Judiciary Committee made one change to the civil remedy provision—it added a private treble-damages provision to the civil remedies already available to the Government; the Committee accorded this change only a single statement in the Committee Report: "The title, as amended, also authorizes civil treble damage suits on the part of private parties who are injured." H. R. Rep. No. 91–1549, p. 35 (1970). Three Congressmen dissented from the Report. Their views are particularly telling because, with language that is narrow compared to the extraordinary scope the civil provision has acquired, these three challenged the possible breadth and abuse of the private civil remedy by plaintiff-*competitors:*

> "Indeed, [§ 1964(c)] provides invitation for disgruntled and malicious *competitors* to harass innocent business-

> men engaged in interstate commerce by authorizing private damage suits. A *competitor* need only raise the claim that his rival has derived gains from two games of poker, and, because this title prohibits even the 'indirect use' of such gains—a provision with tremendous outreach—litigation is begun. What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish—destruction of the rival's business." *Id.*, at 187 (emphasis added).

The bill then returned to the Senate, which passed it without a conference, apparently to assure passage during the session. Thus, the private remedy at issue here slipped quietly into the statute, and its entrance evinces absolutely no intent to revolutionize the enforcement scheme, or to give undue breadth to the broadly worded provisions—provisions Congress fully expected Government enforcers to narrow.

Putting together these various pieces, I can only conclude that Congress intended to give to businessmen who might otherwise have had no available remedy a possible way to recover damages for competitive injury, infiltration injury, or other economic injury resulting out of, but wholly distinct from, the predicate acts. Congress fully recognized that racketeers do not engage in predicate acts *as ends in themselves;* instead, racketeers threaten, burn, and murder in order to induce their victims to act in a way that accrues to the economic benefit of the racketeer, as by ceasing to compete, or agreeing to make certain purchases. Congress' concern was not for the direct victims of the racketeers' acts, whom state and federal laws already protected, but for the competitors and investors whose businesses and interests are harmed or destroyed by racketeers, or whose competitive positions decline because of infiltration in the relevant market. Its focus was on the victims of the extraordinary economic power that racketeers are able to acquire through a wide

range of illicit methods. Indeed, that is why Congress provided for recovery only for injury to business or property—that is, commercial injuries—and not for personal physical or emotional injury.

The only way to give effect to Congress' concern is to require that plaintiffs plead and prove that they suffered RICO injury—injury to their competitive, investment, or other business interests resulting from the defendant's conduct of a business or infiltration of a business or a market, through a pattern of racketeering activity. As I shall demonstrate, this requirement is manageable, and it puts the statute to the use to which it was addressed. In addition, this requirement is faithful to the language of the statute, which does not appear to provide recovery for injuries incurred by reason of individual predicate acts. It also avoids most of the "extraordinary uses" to which the statute has been put, in which legitimate businesses that have engaged in two criminal acts have been labeled "racketeers," have faced treble-damages judgments in favor of the direct victims, and often have settled to avoid the destructive publicity and the resulting harm to reputation. These cases take their toll; their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels. To allow punitive actions and significant damages for injury beyond that which the statute was intended to target is to achieve nothing the statute sought to achieve, and ironically to injure many of those lawful businesses that the statute sought to protect. Under such circumstances, I believe this Court is derelict in its failure to interpret the statute in keeping with the language and intent of Congress.

Several lower courts have remarked, however, that a "RICO injury" requirement, while perhaps contemplated by the statute, defies definition. I disagree. The following series of examples, culled in part from the legislative history of the RICO statute, illustrates precisely what does and does not fall within this definition.

First. If a "racketeer" uses "[t]hreats, arson and assault . . . to force competitors out of business and obtain larger shares of the market," House Hearings, at 106 (statement of Sen. McClellan), the threats, arson, and assault represent the predicate acts. The pattern of those acts is designed to accomplish, and accomplishes, the goal of monopolization. Competitors thereby injured or forced out of business could allege "RICO" injury and recover damages for lost profits. So, too, purchasers of the racketeer's goods or services, who are forced to buy from the racketeer/monopolist at higher prices, and whose businesses therefore are injured, might recover damages for the excess costs of doing business. The direct targets of the predicate acts—whether competitors, suppliers, or others—could recover for damages flowing from the predicate acts themselves, but under state or perhaps other federal law, not RICO.

Second. If a "racketeer" uses arson and threats to induce honest businessmen to pay protection money, or to purchase certain goods, or to hire certain workers, the targeted businessmen could sue to recover for injury to their business and property resulting from the added costs. This would be so if they were the direct victims of the predicate acts or if they had reacted to offenses committed against other businessmen. In each case, the predicate acts were committed in order to accomplish a certain end—*e. g.*, to induce the prospective plaintiffs to take action to the economic benefit of the racketeer; in each case the result would have taken a toll on the competitive position of the prospective plaintiff by increasing his costs of doing business.

At the same time, the plaintiffs could not recover under RICO for the direct damages from the predicate acts. They could not, for example, recover for the cost of the building burned, or for personal injury resulting from the threat. Indeed, compensation for this latter injury is barred already by RICO's exclusion of personal injury claims. As in the previ-

ous example, these injuries are amply protected by state-law damages actions.

Third. If a "racketeer" infiltrates and obtains control of a legitimate business either through fraud, foreclosure on usurious loans, extortion, or acceptance of business interests in payment of gambling debts, the honest investor who is thereby displaced could bring a civil RICO action claiming infiltration injury resulting from the infiltrator's pattern of predicate acts that enabled him to gain control. Thereafter, if the enterprise conducts its business through a pattern of racketeering activity to enhance its profits or perpetuate its economic power, competitors of that enterprise could bring civil RICO actions alleging injury by reason of the enhanced commercial position the enterprise has obtained from its unlawful acts, and customers forced to purchase from sponsored suppliers could recover their added costs of doing business. At the same time, the direct victims of the activity—for example, customers defrauded by an infiltrated bank—could not recover under civil RICO. The bank does not, of course, thereby escape liability. The customers simply must rely on the existing causes of action, usually under state law.

Alternatively, if the infiltrated enterprise operates a legitimate business to a businessman's competitive disadvantage because of the enterprise's strong economic base derived from perpetration of predicate acts, the competitor could bring a civil RICO action alleging injury to his competitive position. The predicate acts then would have enabled the "enterprise" to gain a competitive advantage that brought harm to the plaintiff-competitor. Again, the direct victims of the predicate acts whose profits were invested in the "legitimate enterprise," would not be able to recover damages under civil RICO for injury resulting from the predicate acts alone.

These examples are not exclusive, and if this formulation were adopted, lower courts would, of course, have the oppor-

tunity to smooth numerous rough edges. The examples are designed simply to illustrate the type of injury that civil RICO was, to my mind, designed to compensate. The construction I describe offers a powerful remedy to the honest businessmen with whom Congress was concerned, who might have had no recourse against a "racketeer" prior to enactment of the statute. At the same time, this construction avoids both the theoretical and practical problems outlined in Part I. Under this view, traditional state-law claims are not federalized; federal remedial schemes are not inevitably displaced or superseded; and, consequently, ordinary commercial disputes are not misguidedly placed within the scope of civil RICO.[2]

III

The Court today permits two civil actions for treble damages to go forward that are not authorized either by the language and legislative history of the civil RICO statute, or by the policies that underlay passage of that statute. In so doing, the Court shirks its well-recognized responsibility to assure that Congress' intent is not thwarted by maintenance of unintended litigation, and it does so based on an unfounded and ill-considered reading of a statutory provision. Because I believe the provision at issue is susceptible of a narrower interpretation that comports both with the statutory language and the legislative history, I dissent.

JUSTICE POWELL, dissenting.

I agree with JUSTICE MARSHALL that the Court today reads the civil RICO statute in a way that validates uses of the statute that were never intended by Congress, and I join his dissent. I write separately to emphasize my disagree-

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[2] The analysis in my dissent would lead to the dismissal of the civil RICO claims at stake here. I thus do not need to decide whether a civil RICO action can proceed only after a criminal conviction. See *ante*, at 488–493.

ment with the Court's conclusion that the statute must be applied to authorize the types of private civil actions now being brought frequently against respected businesses to redress ordinary fraud and breach-of-contract cases.[1]

I

In *United States* v. *Turkette*, 452 U. S. 576 (1981), the Court noted that in construing the scope of a statute, its language, if unambiguous, must be regarded as conclusive "*in the absence* of 'a clearly expressed legislative intent to the contrary.'" *Id.*, at 580 (emphasis added) (quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980)). Accord, *Russello* v. *United States*, 464 U. S. 16, 20 (1983). In both *Turkette* and *Russello*, we found that the "declared purpose" of Congress in enacting the RICO statute was "'to seek the eradication of organized crime in the United States.'" *United States* v. *Turkette*, *supra*, at 589 (quoting the statement of findings prefacing the Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 923); accord, *Russello* v. *United States*, *supra*, at 26–27. That organized crime was Congress' target is apparent from the Act's title, is made plain throughout the legislative history of the statute, see, *e. g.*, S. Rep. No. 91–617, p. 76 (1969) (S. Rep.), and is acknowledged by all parties to these two cases. Accord, Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 70–92 (1985) (ABA Report). The legislative history cited by the Court today amply supports this conclusion, see *ante*, at 487–488, and the Court concedes that "in its private civil version, RICO is evolving into something quite

[1] The Court says these suits are not being brought against the "archetypal, intimidating mobster" because of a "defect" that is "inherent in the statute." *Ante*, at 499. If RICO must be construed as the Court holds, this is indeed a defect that Congress never intended. I do not believe that the statute *must* be construed in what in effect is an irrational manner.

different from the original conception of its enactors. See generally ABA Report 55–69." *Ante*, at 500. Yet, the Court concludes that it is compelled by the statutory language to construe § 1964(c) to reach garden-variety fraud and breach of contract cases such as those before us today. *Ibid.*

As the Court of Appeals observed in this case, "[i]f Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it."[2] 741 F. 2d 482, 492 (1984). The Court today concludes that Congress *was* aware of the broad scope of the statute, relying on the fact that some Congressmen objected to the possibility of abuse of the RICO statute by arguing that it could be used "to harass innocent businessmen." H. R. Rep. No. 91–1549, p. 187 (1970) (dissenting views of Reps. Conyers, Mikva, and Ryan); 116 Cong. Rec. 35342 (1970) (remarks of Rep. Mikva).

In the legislative history of every statute, one may find critics of the bill who predict dire consequences in the event of its enactment. A court need not infer from such statements by opponents that Congress *intended* those consequences to occur, particularly where, as here, there is compelling evidence to the contrary. The legislative history reveals that Congress did not state explicitly that the statute would reach only members of the Mafia because it believed there were constitutional problems with establishing such a specific status offense. *E. g.*, *id.*, at 35343–35344 (remarks of Rep. Celler); *id.*, at 35344 (remarks of Rep. Poff). Nonetheless, the legislative history makes clear that the statute was intended to be *applied* to organized crime, and an influential sponsor of the bill emphasized that any effect it had beyond such crime was meant to be only incidental. *Id.*, at 18914 (remarks of Sen. McClellan).

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[2] The force of this observation is accented by RICO's provision for treble damages—an enticing invitation to litigate these claims in federal courts.

The ABA study concurs in this view. The ABA Report states:

> "In an attempt to ensure the constitutionality of the statute, Congress made the central proscription of the statute the use of a 'pattern of racketeering activities' in connection with an 'enterprise,' rather than merely outlawing membership in the Mafia, La Cosa Nostra, or other organized criminal syndicates. 'Racketeering' was defined to embrace a potpourri of federal and state criminal offenses deemed to be the type of criminal activities frequently engaged in by mobsters, racketeers and other traditional members of 'organized crime.' The 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes. The 'enterprise' element, when coupled with the 'pattern' requirement, was intended by the Congress to keep the reach of RICO focused directly on traditional organized crime and comparable ongoing criminal activities carried out in a structured, organized environment. The reach of the statute beyond traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises, was intended to be incidental, and only to the extent necessary to maintain the constitutionality of a statute aimed primarily at organized crime." *Id.*, at 71–72 (footnote omitted).

It has turned out in this case that the naysayers' dire predictions have come true. As the Court notes, *ante*, at 499, and n. 16, RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended target of the statute. While I acknowledge that the language of the statute *may* be read as broadly as the Court interprets it today, I do not believe that it *must*

be so read. Nor do I believe that interpreting the statutory language more narrowly than the Court does will "eliminate the [civil RICO] private action," *ante*, at 499, in cases of the kind clearly identified by the legislative history. The statute may and should be read narrowly to confine its reach to the type of conduct Congress had in mind. It is the duty of this Court to implement the unequivocal intention of Congress.

II

The language of this complex statute is susceptible of being read consistently with this intent. For example, the requirement in the statute of proof of a "pattern" of racketeering activity may be interpreted narrowly. Section 1961(5), defining "pattern of racketeering activity," states that such a pattern "requires at least two acts of racketeering activity." This contrasts with the definition of "racketeering activity" in § 1961(1), stating that such activity "means" any of a number of acts. The definition of "pattern" may thus logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a "pattern" to be proved. The ABA Report concurs in this view. It argues persuasively that "[t]he 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes," ABA Report 72, such as the criminal acts alleged in the case before us today.

The legislative history bears out this interpretation of "pattern." Senator McClellan, a leading sponsor of the bill, stated that "proof of two acts of racketeering activity, without more, does not establish a pattern." 116 Cong. Rec. 18940 (1970). Likewise, the Senate Report considered the "concept of 'pattern' [to be] essential to the operation of the statute." S. Rep., at 158. It stated that the bill was not aimed at sporadic activity, but that the "infiltration of legitimate business normally requires more than one 'racketeering

activity' *and* the threat of continuing activity to be effective. It is this factor of continuity *plus* relationship which combines to produce a pattern." *Ibid.* (emphasis added). The ABA Report suggests that to effectuate this legislative intent, "pattern" should be interpreted as requiring that (i) the racketeering acts be related to each other, (ii) they be part of some common scheme, and (iii) some sort of continuity between the acts or a threat of continuing criminal activity must be shown. ABA Report, at 193–208. By construing "pattern" to focus on the manner in which the crime was perpetrated, courts could go a long way toward limiting the reach of the statute to its intended target—organized crime.

The Court concedes that "pattern" could be narrowly construed, *ante*, at 496, n. 14, and notes that part of the reason civil RICO has been put to such extraordinary uses is because of the "failure of Congress and the courts to develop a meaningful concept of 'pattern,'" *ante*, at 500. The Court declines to decide whether the defendants' acts constitute such a pattern in this case, however, because it concludes that that question is not before the Court. *Ibid.* I agree that the scope of the "pattern" requirement is not included in the questions on which we granted certiorari. I am concerned, however, that in the course of rejecting the Court of Appeals' ruling that the statute requires proof of a "racketeering injury" the Court has read the entire statute so broadly that it will be difficult, if not impossible, for courts to adopt a reading of "pattern" that will conform to the intention of Congress.

The Court bases its rejection of the "racketeering injury" requirement on the general principles that the RICO statute is to be read "broadly," that it is to be "'liberally construed to effectuate its remedial purposes,'" *ante*, at 498 (quoting Pub. L. 91–452, § 904(a), 84 Stat. 947), and that the statute was part of "an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Ante*, at 498. Although the Court acknowledges that few of the legislative statements supporting these principles were made

with reference to RICO's private civil action, it concludes nevertheless that all of the Act's provisions should be read in the "spirit" of these principles. *Ibid.* By constructing such a broad premise for its rejection of the "racketeering injury" requirement, the Court seems to mandate that all future courts read the entire statute broadly.

It is neither necessary to the Court's decision, nor in my view correct, to read the civil RICO provisions so expansively. We ruled in *Turkette* and *Russello* that the statute must be read broadly and construed liberally to effectuate its remedial purposes, but like the legislative history to which the Court alludes, it is clear we were referring there to RICO's *criminal* provisions. It does not necessarily follow that the same principles apply to RICO's private civil provisions. The Senate Report recognized a difference between criminal and civil enforcement in describing proposed civil remedies that would have been available to the Government. It emphasized that although those proposed remedies were intended to place additional pressure on organized crime, they were intended to reach "essentially an economic, *not* a punitive goal." S. Rep., at 81 (emphasis added). The Report elaborated as follows:

> "However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, *but* there is no intent to visit punishment on any individual; the purpose is civil. Punishment as such is limited to the criminal remedies . . . ." *Ibid.* (emphasis added; footnote omitted).

The reference in the Report to "predatory activities" was to organized crime. Only a small fraction of the scores of civil RICO cases now being brought implicate organized crime in any way.[3] Typically, these suits are being brought—in the

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[3] As noted in the ABA Report, of the 270 District Court RICO decisions prior to this year, only 3% (9 cases) were decided throughout the entire decade of the 1970's, whereas 43% (116 cases) were decided in 1984. ABA Report, at 53a (Table). See *ante*, at 481, n. 1.

unfettered discretion of private litigants—in federal court against legitimate businesses seeking treble damages in ordinary fraud and contract cases. There is nothing comparable in those cases to the restraint on the institution of criminal suits exercised by Government prosecutorial discretion. Today's opinion inevitably will encourage continued expansion of resort to RICO in cases of alleged fraud or contract violation rather than to the traditional remedies available in state court. As the Court of Appeals emphasized, it defies rational belief, particularly in light of the legislative history, that Congress intended this far-reaching result. Accordingly, I dissent.

UNITED STATES v. MONTOYA DE HERNANDEZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–755. Argued April 24, 1985—Decided July 1, 1985

Upon her arrival at Los Angeles International Airport on a flight from Bogota, Colombia, respondent was detained by customs officials when, after examination of her passport and the contents of her valise and questioning by the officials, she was suspected of being a "balloon swallower," *i. e.*, one who attempts to smuggle narcotics into this country hidden in her alimentary canal. She was detained incommunicado for almost 16 hours before the officials sought a court order authorizing a pregnancy test (she having claimed to be pregnant), an x ray, and a rectal examination. During those 16 hours she was given the option of returning to Colombia on the next available flight, agreeing to an x ray, or remaining in detention until she produced a monitored bowel movement. She chose the first option, but the officials were unable to place her on the next flight, and she refused to use the toilet facilities. Pursuant to the court order, a pregnancy test was conducted at a hospital and proved negative, and a rectal examination resulted in the obtaining of 88 cocaine-filled balloons that had been smuggled in her alimentary canal. Subsequently, after a suppression hearing, the District Court admitted the cocaine in evidence against respondent, and she was convicted of various federal narcotics offenses. The Court of Appeals reversed, holding that respondent's detention violated the Fourth Amendment because the customs officials did not have a "clear indication" of alimentary canal smuggling at the time respondent was detained.

Held: The detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal; here, the facts, and their rational inferences, known to the customs officials clearly supported a reasonable suspicion that respondent was an alimentary canal smuggler. Pp. 536–544.

(a) The Fourth Amendment's emphasis upon reasonableness is not consistent with the creation of a "clear indication" standard to cover a case such as this as an intermediate standard between "reasonable suspicion" and "probable cause." Pp. 537–541.

(b) The "reasonable suspicion" standard effects a needed balance between private and public interests when law enforcement officials must

make a limited intrusion on less than probable cause. It thus fits well into situations involving alimentary canal smuggling at the border: this type of smuggling gives no external signs, and inspectors will rarely possess probable cause to arrest or search, yet governmental interests in stopping smuggling at the border are high. Pp. 541–542.

(c) Under the circumstances, respondent's detention, while long, uncomfortable, and humiliating, was not unreasonably long. Alimentary canal smuggling cannot be detected in the amount of time in which other illegal activity may be investigated through brief stops. When respondent refused an x ray as an alternative to simply awaiting her bowel movement, the customs inspectors were left with only two practical alternatives: detain her for such time as necessary to confirm their suspicions or turn her loose into the interior of the country carrying the reasonably suspected contraband drugs. Moreover, both the length of respondent's detention and its discomfort resulted solely from the method that she chose to smuggle illicit drugs into this country. And in the presence of an articulable suspicion of alimentary canal smuggling, the customs officials were not required by the Fourth Amendment to pass respondent and her cocaine-filled balloons into the interior. Pp. 542–544.

731 F. 2d 1369, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 545. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 545.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Trott*, and *John F. De Pue*.

Peter M. Horstman, by appointment of the Court, 469 U. S. 1204, argued the cause for respondent. With him on the brief was *Janet I. Levine*.

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Rosa Elvira Montoya de Hernandez was detained by customs officials upon her arrival at the Los Angeles Airport on a flight from Bogota, Colombia. She was found to be smuggling 88 cocaine-filled balloons in her alimen-

tary canal, and was convicted after a bench trial of various federal narcotics offenses. A divided panel of the United States Court of Appeals for the Ninth Circuit reversed her convictions, holding that her detention violated the Fourth Amendment to the United States Constitution because the customs inspectors did not have a "clear indication" of alimentary canal smuggling at the time she was detained. 731 F. 2d 1369 (1984). Because of a conflict in the decisions of the Courts of Appeals on this question and the importance of its resolution to the enforcement of customs laws, we granted certiorari. 469 U. S. 1188. We now reverse.

Respondent arrived at Los Angeles International Airport shortly after midnight, March 5, 1983, on Avianca Flight 080, a direct 10-hour flight from Bogota, Colombia. Her visa was in order so she was passed through Immigration and proceeded to the customs desk. At the customs desk she encountered Customs Inspector Talamantes, who reviewed her documents and noticed from her passport that she had made at least eight recent trips to either Miami or Los Angeles. Talamantes referred respondent to a secondary customs desk for further questioning. At this desk Talamantes and another inspector asked respondent general questions concerning herself and the purpose of her trip. Respondent revealed that she spoke no English and had no family or friends in the United States. She explained in Spanish that she had come to the United States to purchase goods for her husband's store in Bogota. The customs inspectors recognized Bogota as a "source city" for narcotics. Respondent possessed $5,000 in cash, mostly $50 bills, but had no billfold. She indicated to the inspectors that she had no appointments with merchandise vendors, but planned to ride around Los Angeles in taxicabs visiting retail stores such as J. C. Penney and K-Mart in order to buy goods for her husband's store with the $5,000.

Respondent admitted that she had no hotel reservations, but stated that she planned to stay at a Holiday Inn. Respondent could not recall how her airline ticket was pur-

chased. When the inspectors opened respondent's one small valise they found about four changes of "cold weather" clothing. Respondent had no shoes other than the high-heeled pair she was wearing. Although respondent possessed no checks, waybills, credit cards, or letters of credit, she did produce a Colombian business card and a number of old receipts, waybills, and fabric swatches displayed in a photo album.

At this point Talamantes and the other inspector suspected that respondent was a "balloon swallower," one who attempts to smuggle narcotics into this country hidden in her alimentary canal. Over the years Inspector Talamantes had apprehended dozens of alimentary canal smugglers arriving on Avianca Flight 080. See App. 42; *United States* v. *Mendez-Jimenez*, 709 F. 2d 1300, 1301 (CA9 1983).

The inspectors requested a female customs inspector to take respondent to a private area and conduct a patdown and strip search. During the search the female inspector felt respondent's abdomen area and noticed a firm fullness, as if respondent were wearing a girdle. The search revealed no contraband, but the inspector noticed that respondent was wearing two pairs of elastic underpants with a paper towel lining the crotch area.

When respondent returned to the customs area and the female inspector reported her discoveries, the inspector in charge told respondent that he suspected she was smuggling drugs in her alimentary canal. Respondent agreed to the inspector's request that she be x-rayed at a hospital but in answer to the inspector's query stated that she was pregnant. She agreed to a pregnancy test before the x ray. Respondent withdrew the consent for an x ray when she learned that she would have to be handcuffed en route to the hospital. The inspector then gave respondent the option of returning to Colombia on the next available flight, agreeing to an x ray, or remaining in detention until she produced a monitored bowel movement that would confirm or rebut the inspectors'

suspicions. Respondent chose the first option and was placed in a customs office under observation. She was told that if she went to the toilet she would have to use a wastebasket in the women's restroom, in order that female customs inspectors could inspect her stool for balloons or capsules carrying narcotics. The inspectors refused respondent's request to place a telephone call.

Respondent sat in the customs office, under observation, for the remainder of the night. During the night customs officials attempted to place respondent on a Mexican airline that was flying to Bogota via Mexico City in the morning. The airline refused to transport respondent because she lacked a Mexican visa necessary to land in Mexico City. Respondent was not permitted to leave, and was informed that she would be detained until she agreed to an x ray or her bowels moved. She remained detained in the customs office under observation, for most of the time curled up in a chair leaning to one side. She refused all offers of food and drink, and refused to use the toilet facilities. The Court of Appeals noted that she exhibited symptoms of discomfort consistent with "heroic efforts to resist the usual calls of nature." 731 F. 2d, at 1371.

At the shift change at 4:00 o'clock the next afternoon, almost 16 hours after her flight had landed, respondent still had not defecated or urinated or partaken of food or drink. At that time customs officials sought a court order authorizing a pregnancy test, an x ray, and a rectal examination. The Federal Magistrate issued an order just before midnight that evening, which authorized a rectal examination and involuntary x ray, provided that the physician in charge considered respondent's claim of pregnancy. Respondent was taken to a hospital and given a pregnancy test, which later turned out to be negative. Before the results of the pregnancy test were known, a physician conducted a rectal examination and removed from respondent's rectum a balloon containing a foreign substance. Respondent was then placed

formally under arrest. By 4:10 a. m. respondent had passed 6 similar balloons; over the next four days she passed 88 balloons containing a total of 528 grams of 80% pure cocaine hydrochloride.

After a suppression hearing the District Court admitted the cocaine in evidence against respondent. She was convicted of possession of cocaine with intent to distribute, 21 U. S. C. § 841(a)(1), and unlawful importation of cocaine, 21 U. S. C. §§ 952(a), 960(a).

A divided panel of the United States Court of Appeals for the Ninth Circuit reversed respondent's convictions. The court noted that customs inspectors had a "justifiably high level of official skepticism" about respondent's good motives, but the inspectors decided to let nature take its course rather than seek an immediate magistrate's warrant for an x ray. 731 F. 2d, at 1372. Such a magistrate's warrant required a "clear indication" or "plain suggestion" that the traveler was an alimentary canal smuggler under previous decisions of the Court of Appeals. See *United States* v. *Quintero-Castro*, 705 F. 2d 1099 (CA9 1983); *United States* v. *Mendez-Jimenez*, 709 F. 2d 1300, 1302 (CA9 1983); but cf. *South Dakota* v. *Opperman*, 428 U. S. 364, 370, n. 5 (1976). The court applied this required level of suspicion to respondent's case. The court questioned the "humanity" of the inspectors' decision to hold respondent until her bowels moved, knowing that she would suffer "many hours of humiliating discomfort" if she chose not to submit to the x-ray examination. The court concluded that under a "clear indication" standard "the evidence available to the customs officers when they decided to hold [respondent] for continued observation was insufficient to support the 16-hour detention." 731 F. 2d, at 1373.

The Government contends that the customs inspectors reasonably suspected that respondent was an alimentary canal smuggler, and this suspicion was sufficient to justify the detention. In support of the judgment below respondent

argues, *inter alia*, that reasonable suspicion would not support respondent's detention, and in any event the inspectors did not reasonably suspect that respondent was carrying narcotics internally.

The Fourth Amendment commands that searches and seizures be reasonable. What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself. *New Jersey* v. *T. L. O.*, 469 U. S. 325, 337–342 (1985). The permissibility of a particular law enforcement practice is judged by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *United States* v. *Villamonte-Marquez*, 462 U. S. 579, 588 (1983); *Delaware* v. *Prouse*, 440 U. S. 648, 654 (1979); *Camara* v. *Municipal Court*, 387 U. S. 523 (1967).

Here the seizure of respondent took place at the international border. Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country. See *United States* v. *Ramsey*, 431 U. S. 606, 616–617 (1977), citing Act of July 31, 1789, ch. 5, 1 Stat. 29. This Court has long recognized Congress' power to police entrants at the border. See *Boyd* v. *United States*, 116 U. S. 616, 623 (1886). As we stated recently:

> "'Import restrictions and searches of persons or packages at the national border rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad comprehensive powers "[t]o regulate Commerce with foreign Nations," Art. I, § 8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from

entry.'" *Ramsey, supra,* at 618–619, quoting *United States* v. *12 200-Ft. Reels of Film,* 413 U. S. 123, 125 (1973).

Consistently, therefore, with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior. Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant,[1] and first-class mail may be opened without a warrant on less than probable cause, *Ramsey, supra.* Automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion even if the stop is based largely on ethnicity, *United States* v. *Martinez-Fuerte,* 428 U. S. 543, 562–563 (1976), and boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever. *United States* v. *Villamonte-Marquez, supra.*

These cases reflect longstanding concern for the protection of the integrity of the border. This concern is, if anything, heightened by the veritable national crisis in law enforcement caused by smuggling of illicit narcotics, see *United States* v. *Mendenhall,* 446 U. S. 544, 561 (1980) (POWELL, J., concurring), and in particular by the increasing utilization of alimentary canal smuggling. This desperate practice appears to be a relatively recent addition to the smugglers' repertoire of deceptive practices, and it also appears to be exceedingly dif-

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[1] See *United States* v. *Ramsey,* 431 U. S., at 616–619; *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 272–273 (1973); *id.,* at 288 (WHITE, J., dissenting). As the Court stated in *Carroll* v. *United States,* 267 U. S. 132, 154 (1925):

"Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may be lawfully brought in."

ficult to detect.[2] Congress had recognized these difficulties. Title 19 U. S. C. § 1582 provides that "all persons coming into the United States from foreign countries shall be liable to detention and search authorized . . . [by customs regulations]." Customs agents may "stop, search, and examine" any "vehicle, beast or person" upon which an officer suspects there is contraband or "merchandise which is subject to duty." § 482; see also §§ 1467, 1481; 19 CFR §§ 162.6, 162.7 (1984).

Balanced against the sovereign's interests at the border are the Fourth Amendment rights of respondent. Having presented herself at the border for admission, and having subjected herself to the criminal enforcement powers of the Federal Government, 19 U. S. C. § 482, respondent was entitled to be free from unreasonable search and seizure. But not only is the expectation of privacy less at the border than in the interior, see, *e. g.*, *Carroll* v. *United States*, 267 U. S.

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[2] See *United States* v. *DeMontoya*, 729 F. 2d 1369 (CA11 1984) (required surgery; swallowed 100 cocaine-filled condoms); *United States* v. *Pino*, 729 F. 2d 1357 (CA11 1984) (required surgery; 120 cocaine-filled pellets); *United States* v. *Mejia*, 720 F. 2d 1378 (CA5 1983) (75 balloons); *United States* v. *Couch*, 688 F. 2d 599, 605 (CA9 1982) (36 capsules); *United States* v. *Quintero-Castro*, 705 F. 2d 1099 (CA9 1983) (120 balloons); *United States* v. *Saldarriaga-Marin*, 734 F. 2d 1425 (CA11 1984); *United States* v. *Vega-Barvo*, 729 F. 2d 1341 (CA11 1984) (135 condoms); *United States* v. *Mendez-Jimenez*, 709 F. 2d 1300 (CA9 1983) (102 balloons); *United States* v. *Mosquera-Ramirez*, 729 F. 2d 1352 (CA11 1984) (95 condoms); *United States* v. *Castrillon*, 716 F. 2d 1279 (CA9 1983) (83 balloons); *United States* v. *Castaneda-Castaneda*, 729 F. 2d 1360 (CA11 1984) (2 smugglers; 201 balloons); *United States* v. *Caicedo-Guarnizo*, 723 F. 2d 1420 (CA9 1984) (85 balloons); *United States* v. *Henao-Castano*, 729 F. 2d 1364 (CA11 1984) (85 condoms); *United States* v. *Ek*, 676 F. 2d 379 (CA9 1982) (30 capsules); *United States* v. *Padilla*, 729 F. 2d 1367 (CA11 1984) (115 condoms); *United States* v. *Gomez-Diaz*, 712 F. 2d 949 (CA5 1983) (69 balloons); *United States* v. *D'Allerman*, 712 F. 2d 100 (CA5 1983) (80 balloons); *United States* v. *Contento-Pachon*, 723 F. 2d 691 (CA9 1984) (129 balloons).

132, 154 (1925); cf. *Florida* v. *Royer*, 460 U. S. 491, 515 (1983) (BLACKMUN, J., dissenting), the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border. *Supra*, at 538.

We have not previously decided what level of suspicion would justify a seizure of an incoming traveler for purposes other than a routine border search. Cf. *Ramsey*, 431 U. S., at 618, n. 13. The Court of Appeals held that the initial detention of respondent was permissible only if the inspectors possessed a "clear indication" of alimentary canal smuggling. 731 F. 2d, at 1372, citing *United States* v. *Quintero-Castro*, 705 F. 2d 1099 (CA9 1983); cf. *United States* v. *Mendez-Jimenez*, 709 F. 2d 1300 (CA9 1983). This "clear indication" language comes from our opinion in *Schmerber* v. *California*, 384 U. S. 757 (1966), but we think that the Court of Appeals misapprehended the significance of that phrase in the context in which it was used in *Schmerber*.[3] The Court of Appeals viewed "clear indication" as an intermediate standard between "reasonable suspicion" and "probable cause." See *Mendez-Jimenez*, *supra*, at 1302. But we think that the words in *Schmerber* were used to indicate the necessity for particularized suspicion that the evidence sought might be found within the body of the individual, rather than as enunciating still a third Fourth Amendment threshold between "reasonable suspicion" and "probable cause."

No other court, including this one, has ever adopted *Schmerber*'s "clear indication" language as a Fourth Amendment standard. See, *e. g.*, *Winston* v. *Lee*, 470 U. S. 753,

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[3] In that case we stated:

"The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion [beyond the body's surface] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search." 384 U. S., at 769–770.

759–763 (1985) (surgical removal of bullet for evidence). Indeed, another Court of Appeals, faced with facts almost identical to this case, has adopted a less strict standard based upon reasonable suspicion. See *United States* v. *Mosquera-Ramirez*, 729 F. 2d 1352, 1355 (CA11 1984). We do not think that the Fourth Amendment's emphasis upon reasonableness is consistent with the creation of a third verbal standard in addition to "reasonable suspicion" and "probable cause"; we are dealing with a constitutional requirement of reasonableness, not *mens rea*, see *United States* v. *Bailey*, 444 U. S. 394, 403–406 (1980), and subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question.

We hold that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.[4]

The "reasonable suspicion" standard has been applied in a number of contexts and effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause. It thus fits well into the situations involving alimentary canal smuggling at the border: this type of smuggling gives no external signs and inspectors will rarely possess probable cause to arrest or search, yet governmental interests in stopping smuggling at the border are high indeed. Under this standard officials at the border must have a "particularized and objective basis for suspecting the particular person" of ali-

[4] It is also important to note what we do *not* hold. Because the issues are not presented today we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body-cavity, or involuntary x-ray searches. Both parties would have us decide the issue of whether aliens possess lesser Fourth Amendment rights at the border; that question was not raised in either court below and we do not consider it today.

mentary canal smuggling. *United States* v. *Cortez*, 449 U. S. 411, 417 (1981); *id.*, at 418, citing *Terry* v. *Ohio*, 392 U. S. 1, 21, n. 18 (1968).

The facts, and their rational inferences, known to customs inspectors in this case clearly supported a reasonable suspicion that respondent was an alimentary canal smuggler. We need not belabor the facts, including respondent's implausible story, that supported this suspicion, see *supra*, at 533–536. The trained customs inspectors had encountered many alimentary canal smugglers and certainly had more than an "inchoate and unparticularized suspicion or 'hunch,'" *Terry*, *supra*, at 27, that respondent was smuggling narcotics in her alimentary canal. The inspectors' suspicion was a "'common-sense conclusio[n] about human behavior' upon which 'practical people,'—including government officials, are entitled to rely." *T. L. O.*, 469 U. S., at 346, citing *United States* v. *Cortez*, *supra*.

The final issue in this case is whether the detention of respondent was reasonably related in scope to the circumstances which justified it initially. In this regard we have cautioned that courts should not indulge in "unrealistic second-guessing," *United States* v. *Sharpe*, 470 U. S. 675, 686 (1985), and we have noted that "creative judge[s], engaged in *post hoc* evaluations of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *Id.*, at 686–687. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, in itself, render the search unreasonable." *Id.*, at 687, citing *Cady* v. *Dombrowski*, 413 U. S. 433, 447 (1973). Authorities must be allowed "to graduate their response to the demands of any particular situation." *United States* v. *Place*, 462 U. S. 696, 709, n. 10 (1983). Here, respondent was detained incommunicado for almost 16 hours before inspectors sought a warrant; the warrant then took a number of hours to procure, through no apparent fault

of the inspectors. This length of time undoubtedly exceeds any other detention we have approved under reasonable suspicion. But we have also consistently rejected hard-and-fast time limits, *Sharpe*, *supra*; *Place*, *supra*, at 709, n. 10. Instead, "common sense and ordinary human experience must govern over rigid criteria." *Sharpe*, *supra*, at 685.

The rudimentary knowledge of the human body which judges possess in common with the rest of humankind tells us that alimentary canal smuggling cannot be detected in the amount of time in which other illegal activity may be investigated through brief *Terry*-type stops. It presents few, if any external signs; a quick frisk will not do, nor will even a strip search. In the case of respondent the inspectors had available, as an alternative to simply awaiting her bowel movement, an x ray. They offered her the alternative of submitting herself to that procedure. But when she refused that alternative, the customs inspectors were left with only two practical alternatives: detain her for such time as necessary to confirm their suspicions, a detention which would last much longer than the typical *Terry* stop, or turn her loose into the interior carrying the reasonably suspected contraband drugs.

The inspectors in this case followed this former procedure. They no doubt expected that respondent, having recently disembarked from a 10-hour direct flight with a full and stiff abdomen, would produce a bowel movement without extended delay. But her visible efforts to resist the call of nature, which the court below labeled "heroic," disappointed this expectation and in turn caused her humiliation and discomfort. Our prior cases have refused to charge police with delays in investigatory detention attributable to the suspect's evasive actions, see *Sharpe*, 470 U. S., at 687–688; *id.*, at 697 (MARSHALL, J., concurring in judgment), and that principle applies here as well. Respondent alone was responsible for much of the duration and discomfort of the seizure.

Under these circumstances, we conclude that the detention in this case was not unreasonably long. It occurred at the international border, where the Fourth Amendment balance of interests leans heavily to the Government. At the border, customs officials have more than merely an investigative law enforcement role. They are also charged, along with immigration officials, with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives. See 8 U. S. C. §§ 1182(a)(23), 1182(a)(6), 1222; 19 CFR §§ 162.4–162.7 (1984). See also 19 U. S. C. § 482; 8 U. S. C. § 1103(a). In this regard the detention of a suspected alimentary canal smuggler at the border is analogous to the detention of a suspected tuberculosis carrier at the border: both are detained until their bodily processes dispel the suspicion that they will introduce a harmful agent into this country. Cf. 8 U. S. C. § 1222; 42 CFR pt. 34 (1984); 19 U. S. C. §§ 482, 1582.

Respondent's detention was long, uncomfortable, indeed, humiliating; but both its length and its discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country. In *Adams* v. *Williams*, 407 U. S. 143 (1972), another *Terry*-stop case, we said that "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Id.*, at 145. Here, by analogy, in the presence of articulable suspicion of smuggling in her alimentary canal, the customs officers were not required by the Fourth Amendment to pass respondent and her 88 cocaine-filled balloons into the interior. Her detention for the period of time necessary to either verify or dispel the suspicion was not unreasonable. The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE STEVENS, concurring in the judgment.

If a seizure and a search of the person of the kind disclosed by this record may be made on the basis of reasonable suspicion, we must assume that a significant number of innocent persons will be required to undergo similar procedures. The rule announced in this case cannot, therefore, be supported on the ground that respondent's prolonged and humiliating detention "resulted solely from the method by which she chose to smuggle illicit drugs into this country." *Ante*, at 544.

The prolonged detention of respondent was, however, justified by a different choice that respondent made; she withdrew her consent to an x-ray examination that would have easily determined whether the reasonable suspicion that she was concealing contraband was justified. I believe that customs agents may require that a nonpregnant person reasonably suspected of this kind of smuggling submit to an x-ray examination as an incident to a border search. I therefore concur in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

We confront a "disgusting and saddening episode" at our Nation's border.[1] Shortly after midnight on March 5, 1983, the respondent Rosa Elvira Montoya de Hernandez was detained by customs officers because she fit the profile of an "alimentary canal smuggler."[2] This profile did not of course give the officers probable cause to believe that De Hernandez

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[1] *United States* v. *Holtz*, 479 F. 2d 89, 94 (CA9 1973) (Ely, J., dissenting) (*re* "the disrobing and search of a woman by United States border police").

[2] Specifically, De Hernandez "had paid cash for her ticket, came from a source port of embarcation, carried $5,000 in U. S. currency, had made many trips of short duration into the United States, had no family or friends in the United States, had only one small piece of luggage, had no confirmed hotel reservations, did not speak English, and said she was planning to go shopping using taxis for transportation." 731 F. 2d 1369, 1371, n. 3 (CA9 1984).

was smuggling drugs into the country, but at most a "reasonable suspicion" that she might be engaged in such an attempt. After a thorough strip search failed to uncover any contraband, De Hernandez agreed to go to a local hospital for an abdominal x ray to resolve the matter. When the officers approached with handcuffs at the ready to lead her away, however, "she crossed her arms by her chest and began stepping backwards shaking her head negatively," protesting: "You are not going to put those on me. That is an insult to my character."[3]

Stymied in their efforts, the officers decided on an alternative course: they would simply lock De Hernandez away in an adjacent manifest room "until her peristaltic functions produced a monitored bowel movement."[4] The officers explained to De Hernandez that she could not leave until she had excreted by squatting over a wastebasket pursuant to the watchful eyes of two attending matrons. De Hernandez responded: "I will not submit to your degradation and I'd rather die."[5] She was locked away with the matrons.

De Hernandez remained locked up in the room for almost *24 hours*. Three shifts of matrons came and went during this time. The room had no bed or couch on which she could lie, but only hard chairs and a table. The matrons told her that if she wished to sleep she could lie down on the hard, uncarpeted floor. De Hernandez instead "sat in her chair clutching her purse," "occasionally putting her head down on the table to nap."[6] Most of the time she simply wept and pleaded "to go home."[7] She repeatedly begged for permission "to call my husband and tell him what you are doing to

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[3] Declaration of Teodora A. Mendoza ¶ 6 (Mendoza Declaration), App. 58; Declaration of Jose Angel Serrato ¶ 10 (Serrato Declaration), App. 47.

[4] 731 F. 2d, at 1371. See also App. 18–20, 25, 28, 58.

[5] Serrato Declaration ¶ 17, App. 48.

[6] *Id.* ¶ 19, App. 48; Declaration of Marilee S. Morgan ¶ 3 (Morgan Declaration), App. 49.

[7] Declaration of Jerome Gonzales ¶ 20 (Gonzales Declaration), App. 55. See also *id.* ¶ 15, App. 54.

me."[8] Permission was denied. Sobbing, she insisted that she had to "make a phone call home so that she could talk to her children and to let them know that everything was all right."[9] Permission again was denied. In fact, the matrons considered it highly "unusual" that "each time someone entered the search room, she would take out two small pictures of her children and show them to the person."[10] De Hernandez also demanded that her attorney be contacted.[11] Once again, permission was denied. As far as the outside world knew, Rosa de Hernandez had simply vanished. And although she already had been stripped and searched and probed, the customs officers decided about halfway through her ordeal to repeat that process—"to ensure the safety of the surveilling officers. The result was again negative."[12]

After almost 24 hours had passed, someone finally had the presence of mind to consult a Magistrate and to obtain a court order for an x ray and a body-cavity search.[13] De

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[8] Serrato Declaration ¶ 12, App. 47. See also Morgan Declaration ¶ 5, App. 49.

[9] Gonzales Declaration ¶ 21, App. 55.

[10] Morgan Declaration ¶ 4, App. 49. See also Gonzales Declaration ¶ 15, App. 54.

[11] Serrato Declaration ¶ 14, App. 47.

[12] Stipulation Re Trial and Order Thereon, App. 64.

[13] A customs inspector had initially suggested that a court order for an x-ray examination be obtained, but his supervisor vetoed the idea on the grounds that (1) it was not Government policy to seek judicial authorization in such circumstances, *id.*, at 22–23, and (2) "they did not have sufficient facts to support the issuance of the order," 731 F. 2d, at 1373. The inspector called several hours later and reiterated his suggestion; again it was denied. *Ibid.* Not until 16 hours had elapsed did the supervisor begin to consider obtaining a court order. App. 23. Another eight hours passed before the supervisor got around to contacting a Federal Magistrate, who after putting the supervisor under oath and listening to the available evidence promptly issued a telephonic order to proceed with the x-ray examination. Declaration of Kyle E. Windes ¶ 11, App. 40. See also *id.*, at 44–45; n. 27, *infra*.

The Magistrate's order was based largely on the observations by customs officials of De Hernandez' behavior during her detention. See App. 42. As the Ninth Circuit concluded, because the unlawful detention

Hernandez, "very agitated," was handcuffed and led away to the hospital.[14] A rectal examination disclosed the presence of a cocaine-filled balloon. At approximately 3:15 on the morning of March 6, *almost 27 hours after her initial detention*, De Hernandez was formally placed under arrest and advised of her *Miranda* rights. Over the course of the next four days she excreted a total of 88 balloons.

"[T]hat the [respondent] so degraded herself as to offend the sensibilities of any decent citizen is not questioned."[15] That is not the issue we face. For "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States* v. *Rabinowitz*, 339 U. S. 56, 69 (1950) (Frankfurter, J., dissenting). The standards we fashion to govern the ferreting out of the guilty apply equally to the detention of the innocent, and "may be exercised by the most unfit and ruthless officers as well as by the fit and responsible." *Brinegar* v. *United States*, 338 U. S. 160, 182 (1949) (Jackson, J., dissenting).[16] Nor is the issue whether there is a "veritable

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produced the "additional evidence" that was used to obtain the order, the contraband discovered in implementing the order was tainted and therefore improperly introduced at De Hernandez' trial. 731 F. 2d, at 1372.

[14] Morgan Declaration ¶ 9, App. 50.

[15] *United States* v. *Holtz*, 479 F. 2d, at 94 (Ely, J., dissenting).

[16] Justice Jackson also noted in *Brinegar:*

"We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit. We must remember, too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke advance protection. For example, any effective interference with freedom of the press, or free speech, or religion, usually requires a course of suppressions against which the citizen can and often does go to the court and obtain an injunction. Other rights, such as that to an impartial jury or the aid of counsel, are within the supervisory power of the courts themselves. Such a right as just compensation for the taking of private property may be vindicated after the act in terms of money.

"But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's

national crisis in law enforcement caused by smuggling of illicit narcotics." *Ante*, at 538. There is, and "[s]tern enforcement of the criminal law is the hallmark of a healthy and self-confident society." *Davis* v. *United States*, 328 U. S. 582, 615 (1946) (Frankfurter, J., dissenting). "But in our democracy such enforcement presupposes a moral atmosphere and a reliance upon intelligence whereby the effective administration of justice can be achieved with due regard for those civilized standards in the use of the criminal law which are formulated in our Bill of Rights." *Ibid.*

The issue, instead, is simply this: Does the Fourth Amendment permit an international traveler, citizen or alien, to be subjected to the sort of treatment that occurred in this case without the sanction of a judicial officer and based on nothing more than the "reasonable suspicion" of low-ranking investigative officers that something might be amiss? The Court today concludes that the Fourth Amendment grants such sweeping and unmonitored authority to customs officials. It reasons that "[t]he permissibility of a particular law enforcement practice is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Ante*, at 537. The Court goes on to assert that the "balance of reasonableness is qualitatively different at the international border," and that searches and seizures in these circumstances may therefore be conducted without probable cause or a warrant. *Ante*, at 538. Thus a traveler at the Nation's border may be detained for criminal investigation merely if the authorities "reasonably suspect that the traveler is smuggling contraband." *Ante*, at 541. There are no "hard-and-fast time limits" for

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supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence." 338 U. S., at 182 (dissenting opinion).

such investigative detentions, because "'common sense and ordinary human experience must govern over rigid criteria.'" *Ante*, at 543. Applying this "reasonableness" test to the instant case, the Court concludes that the "[r]espondent alone was responsible for much of the duration and discomfort of the seizure." *Ibid.*

JUSTICE STEVENS takes a somewhat different tack. Apparently convinced that the health effects of x-irradiation on human beings stand established as so minimal as to be little cause for concern, he believes that low-ranking customs officials on their own initiative may require nonpregnant international travelers to submit to warrantless x rays on nothing more than suspicion if such travelers wish to avoid indeterminate warrantless detentions. Because De Hernandez withdrew her consent to proceed in handcuffs to such an examination, "[t]he prolonged detention of respondent was . . . justified." *Ante*, at 545 (concurring in judgment).

I dissent. Indefinite involuntary incommunicado detentions "for investigation" are the hallmark of a police state, not a free society. See, *e. g.*, *Dunaway* v. *New York*, 442 U. S. 200 (1979); *Brown* v. *Illinois*, 422 U. S. 590 (1975); *Davis* v. *Mississippi*, 394 U. S. 721 (1969). In my opinion, Government officials may no more confine a person at the border under such circumstances for purposes of criminal investigation than they may within the interior of the country. The nature and duration of the detention here may well have been tolerable for spoiled meat or diseased animals, but not for human beings held on simple suspicion of criminal activity. I believe such indefinite detentions can be "reasonable" under the Fourth Amendment only with the approval of a magistrate. I also believe that such approval can be given only upon a showing of probable cause. Finally, I believe that the warrant and probable-cause safeguards equally govern JUSTICE STEVENS' proffered alternative of exposure to x-irradiation for criminal-investigative purposes.

I

Travelers at the national border are routinely subjected to questioning, patdowns, and thorough searches of their belongings. These measures, which involve relatively limited invasions of privacy and which typically are conducted on all incoming travelers, do not violate the Fourth Amendment given the interests of "national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Carroll* v. *United States*, 267 U. S. 132, 154 (1925).[17] Individual travelers also may be singled out on "reasonable suspicion" and briefly held for further investigation. Cf. *Terry* v. *Ohio*, 392 U. S. 1 (1968).[18] At some point, however, further investigation involves such severe intrusions on the values the Fourth Amendment protects that more stringent safeguards are required. For example, the length and nature of a detention may, at least when conducted for criminal-investigative purposes, ripen into something approximating a full-scale custodial arrest—indeed, the arrestee, unlike the detainee in cases such as this, is at least given such basic rights as a telephone call, *Miranda* warnings, a bed, a prompt hearing before the nearest federal magistrate, an appointed attorney, and consideration of bail. In addition, border detentions may involve the use of such highly intrusive investigative techniques as body-cavity searches, x-ray searches, and stomach pumping.[19]

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[17] See generally 3 W. LaFave, Search and Seizure § 10.5, pp. 276–281 (1978) (LaFave).

[18] See generally *id.* § 10.5, at 281–286.

[19] See generally *id.* § 10.5, at 286–295; Note, From Bags to Body Cavities: The Law of Border Search, 74 Colum. L. Rev. 53 (1974); Comment, Intrusive Border Searches—Is Judicial Control Desirable?, 115 U. Pa. L. Rev. 276 (1966); Note, Border Searches and the Fourth Amendment, 77 Yale L. J. 1007 (1968).

I believe that detentions and searches falling into these more intrusive categories are presumptively "reasonable" within the meaning of the Fourth Amendment only if authorized by a judicial officer. "Though the Fourth Amendment speaks broadly of 'unreasonable searches and seizures,' the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause." *United States* v. *United States District Court*, 407 U. S. 297, 315 (1972).

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson* v. *United States*, 333 U. S. 10, 13–14 (1948).

Accordingly, the Court repeatedly has emphasized that the Fourth Amendment's Warrant Clause is not mere "dead language" or a bothersome "inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." *United States* v. *United States District Court*, *supra*, at 315; *Coolidge* v. *New Hampshire*, 403 U. S. 443, 473–484 (1971).[20]

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[20] See *Katz* v. *United States*, 389 U. S. 347, 354 (1967); *Berger* v. *New York*, 388 U. S. 41, 57, 60 (1967); *Beck* v. *Ohio*, 379 U. S. 89, 96–97 (1964); *Wong Sun* v. *United States*, 371 U. S. 471, 481–482 (1963); *Agnello* v.

We have, to be sure, held that executive officials need not obtain prior judicial authorization where exigent circumstances would make such authorization impractical and counterproductive. In so holding, however, we have reaffirmed the general rule that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Terry* v. *Ohio*, *supra*, at 20. And even where a person has permissibly been taken into custody without a warrant, we have held that a prompt probable-cause determination by a detached magistrate is a constitutional "prerequisite to extended restraint of liberty following arrest." *Gerstein* v. *Pugh*, 420 U. S. 103, 114 (1975).[21] Cf. *Mallory* v. *United States*, 354 U. S. 449, 451–452 (1957); *McNabb* v. *United States*, 318 U. S. 332, 342 (1943); 18 U. S. C. § 3501(c); Fed. Rule Crim. Proc. 5.

United States, 269 U. S. 20, 33 (1925). See also *New Jersey* v. *T. L. O.*, 469 U. S. 325, 357 (1985) (BRENNAN, J., dissenting) (emphasis in original):

"To require a showing of some extraordinary governmental interest before dispensing with the warrant requirement is not to undervalue society's need to apprehend violators of the criminal law. To be sure, forcing law enforcement personnel to obtain a warrant before engaging in a search will predictably deter the police from conducting some searches that they would otherwise like to conduct. But this is not an unintended *result* of the Fourth Amendment's protection of privacy; rather, it is the very *purpose* for which the Amendment was thought necessary. Only where the governmental interests at stake exceed those implicated in any ordinary law enforcement context—that is, only where there is some extraordinary governmental interest involved—is it legitimate to engage in a balancing test to determine whether a warrant is indeed necessary."

[21] "Once the suspect is in custody, . . . the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish

There is no persuasive reason not to apply these principles to lengthy and intrusive criminal-investigative detentions occurring at the Nation's border. To be sure, the Court today invokes precedent stating that neither probable cause nor a warrant ever have been required for border searches. See *ante*, at 537, citing *United States* v. *Ramsey*, 431 U. S. 606 (1977). If this is the law as a general matter, I believe it is time that we reexamine its foundations.[22] For while the power of Congress to authorize wide-ranging detentions and searches *for purposes of immigration and customs control* is unquestioned, the Court previously has emphasized that far different considerations apply when detentions and searches are carried out *for purposes of investigating suspected criminal activity*. See *Wong Wing* v. *United States*, 163 U. S. 228, 231, 235–236, 238 (1896); see also *Abel* v. *United States*, 362 U. S. 217, 250 (1960) (BRENNAN, J., dissenting). And even if the Court is correct that such detentions for purposes of criminal investigation were viewed as acceptable a century or two ago, see *ante*, at 537, we repeatedly have stressed that "this Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton* v. *New York*, 445 U. S. 573, 591, n. 33 (1980); see also *Tennessee* v. *Garner*, 471 U. S. 1, 13 (1985).

The Government contends, however, that because investigative detentions of the sort that occurred in this case need not be supported by probable cause, no warrant is required, given the phraseology of the Fourth Amendment's Warrant

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meaningful protection from unfounded interference with liberty." *Gerstein* v. *Pugh*, 420 U. S., at 114.

[22] Others agree. See, *e. g.*, 3 LaFave § 10.5, at 325 (*Ramsey* offered only "a flimsy and not particularly satisfying explanation" for refusing to apply the warrant requirement); Note, 74 Colum. L. Rev., *supra* n. 19, at 82–86; Comment, 115 U. Pa. L. Rev., *supra* n. 19, at 277. See also *United States* v. *Holtz*, 479 F. 2d, at 94 (Ely, J., dissenting); *Blefare* v. *United States*, 362 F. 2d 870, 880 (CA9 1966) (Ely, J., dissenting).

Clause. See Brief for United States 29, n. 26.[23] Even assuming that border detentions and searches that become lengthy and highly intrusive need not be supported by probable cause, but see Part II, *infra*, this reasoning runs squarely contrary to the Court's administrative-warrant cases. We have repeatedly held that the Fourth Amendment's purpose of safeguarding "the privacy and security of individuals against arbitrary invasions by government officials" is so fundamental as to require, except in "certain carefully defined classes of cases," a magistrate's prior authorization even where "[p]robable cause in the criminal law sense is not required." *Camara* v. *Municipal Court*, 387 U. S. 523, 528 (1967); *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312, 320 (1978). We have applied this requirement to fire, health, and housing-code inspections, *Camara* v. *Municipal Court*, *supra; See* v. *Seattle*, 387 U. S. 541 (1967), to occupational health and safety inspections of the workplace, *Marshall* v. *Barlow's, Inc.*, *supra*, and to arson investigations, *Michigan* v. *Clifford*, 464 U. S. 287 (1984) (plurality opinion); *Michigan* v. *Tyler*, 436 U. S. 499 (1978). See also *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 279–285 (1973) (POWELL, J., concurring) (prior judicial authorization is required for area-wide roving searches near the border); *United States* v. *United States District Court*, 407 U. S., at 322–324 (prior judicial authorization of national-security wiretaps).

Something has gone fundamentally awry in our constitutional jurisprudence when a neutral and detached magistrate's authorization is required before the authorities may inspect "the plumbing, heating, ventilation, gas, and electri-

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[23] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

cal systems" in a person's home,[24] investigate the back rooms of his workplace, or poke through the charred remains of his gutted garage, but *not* before they may hold him in indefinite involuntary isolation at the Nation's border to investigate whether he might be engaged in criminal wrongdoing. No less than those who conduct administrative searches, those charged with investigative duties at the border "should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks," because "unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy." *Id.*, at 317. And unlike administrative searches, which typically involve "relatively limited invasion[s]" of individual privacy interests, *Camara* v. *Municipal Court*, *supra*, at 537, many border searches carry grave potential for "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals," *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 554 (1976); see also *United States* v. *Ortiz*, 422 U. S. 891, 895 (1975); *Almeida-Sanchez* v. *United States*, *supra*, at 273–275. The conditions of De Hernandez' detention in this case—indefinite confinement in a squalid back room cut off from the outside world, the absence of basic amenities that would have been provided to even the vilest of hardened criminals, repeated strip searches—in many ways surpassed the conditions of a full custodial arrest. Although the Court previously has declined to require a warrant for border searches involving "minor interference with privacy resulting from the mere stop for questioning," *United States* v. *Martinez-Fuerte*, *supra*, at 565, surely there is no parallel between such "minor" intrusions and the extreme invasion of personal privacy and dignity that occurs in detentions and searches such as that before us today.

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[24] LaFave, Administrative Searches and the Fourth Amendment: The Camara and See Cases, 1967 S. Ct. Rev. 1, 19.

Moreover, the available evidence suggests that the number of highly intrusive border searches of suspicious-looking but ultimately innocent travelers may be very high. One physician who at the request of customs officials conducted many "internal searches"—rectal and vaginal examinations and stomach pumping—estimated that he had found contraband in only 15 to 20 percent of the persons he had examined.[25] It has similarly been estimated that only 16 percent of women subjected to body-cavity searches at the border were in fact found to be carrying contraband.[26] It is precisely to minimize the risk of harassing so many innocent people that the Fourth Amendment requires the intervention of a judicial officer. See, *e. g.*, *Coolidge* v. *New Hampshire*, 403 U. S., at 481. And even if the warrant safeguard were somehow a mere inconvenient nuisance to be "'weighed' against the claims of police efficiency," *ibid.*, the Government points to no unusual efficiency concerns suggesting that this safeguard should be overridden in the run of such intrusive border-search cases. Certainly there were no "exigent circumstances" supporting the indefinite warrantless detention here, and the Government's interest in proceeding expeditiously could have been achieved by obtaining a telephonic

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[25] *Thompson* v. *United States*, 411 F. 2d 946, 948 (CA9 1969); see also *Morales* v. *United States*, 406 F. 2d 1298, 1300, n. 2 (CA9 1969).

[26] *United States* v. *Holtz*, 479 F. 2d, at 94 (Ely, J., dissenting) (citing testimony from congressional hearings). It was suggested at oral argument that "with all the experience the government has had in the intervening years with increasing drug traffic" there might be "a little more skill in detection today." Tr. of Oral Arg. 38. There are, however, no published statistics more recent than the information discussed in text. It is of course the Government's burden to muster facts demonstrating the reasonableness of its investigative practices. See, *e. g.*, *Florida* v. *Royer*, 460 U. S. 491, 500 (1983) (plurality opinion). The Government advised the Court at argument that it has more recent statistical evidence respecting the number of innocent travelers who are subjected to x-ray searches, but did not disclose that evidence because "it's not in the record and it's not public." Tr. of Oral Arg. 23.

search warrant—a procedure "ideally suited to the peculiar needs of the customs authorities" and one that ultimately was used in this case a full day after De Hernandez was first detained.[27]

The Court supports its evasion of the warrant requirement, however, by analogizing to the *Terry* line of cases authorizing brief detentions based on reasonable suspicion. It argues that no "hard-and-fast time limits" can apply in this context because "alimentary canal smuggling cannot be detected in the amount of time in which other illegal activity may be investigated through brief *Terry*-type stops." *Ante*, at 543. I have previously set forth my views on the proper scope and duration of *Terry* stops,[28] and need not repeat those views in detail today. It is enough for present purposes to note that today's opinion is the most extraordinary example to date of the Court's studied effort to employ the *Terry* decision as a means of converting the Fourth Amendment into a general "reasonableness" balancing process—a process "in which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales." *United States* v. *Sharpe*, 470 U. S. 675, 720 (1985) (BRENNAN, J., dissenting). We previously have emphasized that *Terry* allows the authorities *briefly* to detain an individual for investigation and questioning, but that "any *further detention* or search must be based on consent or probable cause." *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 882 (1975) (emphasis

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[27] Note, 74 Colum. L. Rev., *supra* n. 19, at 85; see n. 13, *supra*. The Government argues, however, that "[a] warrant requirement would be especially inappropriate in this context because the suspect would have to be detained while the officer obtained the warrant . . . ." Brief for United States 29–30, n. 26. Coming from the Government in a case in which it is seeking to defend a *27-hour* detention, this expression of purported concern for travelers' rights is simply incredible.

[28] See, *e. g.*, *United States* v. *Sharpe*, 470 U. S. 675, 702 (1985) (dissenting); *United States* v. *Place*, 462 U. S. 696, 710 (1983) (concurring in result); *Kolender* v. *Lawson*, 461 U. S. 352, 362 (1983) (concurring); *Florida* v. *Royer*, *supra*, at 509 (concurring in result).

added). Allowing such warrantless detentions under *Terry* suggests that the authorities might hold a person on suspicion for "however long it takes" to get him to cooperate, or to transport him to the station where the "legitimate" state interests more fully can be pursued, or simply to lock him away while deciding what the State's "legitimate" interests require. But the Fourth Amendment flatly prohibits such "wholesale intrusions upon the personal security" of individuals, and any application of *Terry* even by analogy to permit such indefinite detentions "would threaten to swallow" the basic probable-cause and warrant safeguards. *Dunaway* v. *New York*, 442 U. S., at 213; see *Davis* v. *Mississippi*, 394 U. S., at 726.[29] It is simply staggering that the Court suggests that *Terry* would even begin to sanction a *27-hour criminal-investigative detention*, even one occurring at the border.

The Court argues, however, that the length and "discomfort" of De Hernandez' detention "resulted *solely* from the method by which she chose to smuggle illicit drugs into this country," and it speculates that only her "'heroic'" efforts prevented the detention from being brief and to the point. *Ante*, at 544 (emphasis added). Although we now know that De Hernandez was indeed guilty of smuggling drugs internally, such *post hoc* rationalizations have no place in our Fourth Amendment jurisprudence, which demands that we "prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." *United States* v. *Martinez-Fuerte*, 428 U. S., at 565. See also *Beck* v. *Ohio*, 379 U. S. 89, 96 (1964). At the time the authorities simply had, at most, a reasonable suspicion that De Hernandez

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[29] See also *Florida* v. *Royer*, *supra*, at 499, 505–506 (plurality opinion); *Brown* v. *Illinois*, 422 U. S. 590, 605 (1975) ("The impropriety of the arrest was obvious . . . . The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion").

might be engaged in such smuggling. Neither the law of the land nor the law of nature supports the notion that petty government officials can require people to excrete on command; indeed, the Court relies elsewhere on "[t]he rudimentary knowledge of the human body" in sanctioning the "much longer than . . . typical" duration of detentions such as this. *Ante*, at 543. And, with all respect to the Court, it is not "'unrealistic second-guessing,'" *ante*, at 542, to predict that an innocent traveler, locked away in incommunicado detention in unfamiliar surroundings in a foreign land, might well be so frightened and exhausted as to be unable so to "cooperate" with the authorities.[30]

The Court further appears to believe that such investigative practices are "reasonable," however, on the premise that a traveler's "expectation of privacy [is] less at the border than in the interior." *Ante*, at 539. This may well be so with respect to routine border inspections, but I do not imagine that decent and law-abiding international travelers have yet reached the point where they "expect" to be thrown into locked rooms and ordered to excrete into wastebaskets, held incommunicado until they cooperate, or led away in handcuffs to the nearest hospital for exposure to various medical procedures—all on nothing more than the "reasonable" suspicions of low-ranking enforcement agents. In fact, many people from around the world travel to our borders precisely to escape such unchecked executive investigatory discretion. What a curious first lesson in American liberty awaits them

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[30] As De Hernandez' counsel observed at argument: "What if an innocent traveler just because they have had a long flight was unable to excrete and found themselves in a position where a border agent said well, we wish you to excrete [on] command so that we will be sure that you're not carrying anything internally. An innocent person might be unable to do that on command, and it wouldn't be heroic efforts in that case. . . . It's certainly possible that a person who is nervous or afraid anyway because they are being confined would be unable to excrete for a lengthy period of time, but that wouldn't necessarily mean evidence of guilt." Tr. of Oral Arg. 28–29.

on their arrival. Cf. *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting).[31]

Finally, I disagree with JUSTICE STEVENS that De Hernandez' alternative "choice" of submitting to abdominal x-irradiation at the discretion of customs officials made this detention "justified." *Ante*, at 545 (concurring in judgment). Medical x rays are of course a common diagnostic technique; that is exactly why there is such a sharp debate among the medical community concerning the cellular and chromosomal effects of routine reliance on x rays, both from the perspective of individual health (it having been estimated that a routine medical x ray takes about six days off a person's life expectancy[32]) and from the perspective of successive generations. The "additivity" factor—the cumulative effect of x rays on an individual's biological and genetic well-being—has been the subject of particularly disturbing debate.[33]

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[31] As I have written in the analogous context of searches of children conducted by school authorities:

"We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant certiorari to teach petitioner another lesson: that the Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' . . . . Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms." *Doe* v. *Renfrow*, 451 U. S. 1022, 1027–1028 (1981) (dissenting from denial of certiorari). See also *New Jersey* v. *T. L. O.*, 469 U. S., at 354 (BRENNAN, J., dissenting); *id.*, at 373–374 (STEVENS, J., dissenting). Cf. 8 U. S. C. § 1423(2) (as a condition of naturalization, a person must have "a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States").

[32] Gregg, Effects of Ionizing Radiations on Humans, in 2 Handbook of Medical Physics 404 (R. Waggener ed. 1982).

[33] See generally *id.*, at 375–411; H. Cember, Introduction to Health Physics 177–199 (2d ed. 1983); U. S. Department of Health and Human Services, Food and Drug Administration, Public Health Service, Possible Genetic Damage from Diagnostic X Irradiation: A Review (1980).

But these dangers are not the gravamen of my dispute with JUSTICE STEVENS; the Court has concluded that medical practices far more immediately intrusive than this may in carefully limited circumstances be employed as a tool of criminal investigation. Cf. *Winston* v. *Lee*, 470 U. S. 753 (1985). Rather, the crux of my disagreement is this: We have learned in our lifetimes, time and again, the inherent dangers that result from coupling unchecked "law enforcement" discretion with the tools of medical technology. Accordingly, in this country at least, "[t]he importance of informed, detached and deliberate [judicial] determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Schmerber* v. *California*, 384 U. S. 757, 770 (1966). Because "[s]earch warrants are ordinarily required for searches of dwellings, . . . *absent an emergency*, no less could be required where intrusions into the human body are concerned." *Ibid.* (emphasis added). This should be so whether the intrusion is by incision, by stomach pumping, or by exposure to x-irradiation. Because no exigent circumstances prevented the authorities from seeking a magistrate's authorization so to probe De Hernandez' abdominal cavity, the proffered alternative "choice" of a warrantless x ray was just as impermissible as the 27-hour detention that actually occurred.

II

I believe that De Hernandez' detention violated the Fourth Amendment for an additional reason: it was not supported by probable cause. In the domestic context, a detention of the sort that occurred here would be permissible only if there were probable cause at the outset. See, *e. g.*, *Hayes* v. *Florida*, 470 U. S. 811, 815 (1985); *Dunaway* v. *New York*, 442 U. S., at 207–208, 212–216; *Brown* v. *Illinois*, 422 U. S., at 602, 605; *Davis* v. *Mississippi*, 394 U. S., at 726–727. This

same elementary safeguard should govern border searches *when carried out for purposes of criminal investigation.*

To be sure, it is commonly asserted that as a result of the Fourth Amendment's "border exception" there is no requirement of probable cause for such investigations.[34] But the justifications for the border exception necessarily limit its breadth. The exception derives from the unquestioned and paramount interest in "national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Carroll* v. *United States*, 267 U. S., at 154. See also *Almeida-Sanchez* v. *United States*, 413 U. S., at 272 (border exception is a reasonable condition for those "seeking to cross our borders"); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123, 125 (1973) (border exception is a reasonable condition "to prevent prohibited articles from entry"). Subject only to the other applicable guarantees of the Bill of Rights, this interest in "national self-protection" is plenary. Thus, as the Court notes, a suspected tuberculosis carrier may be detained at the border for medical testing and treatment as a condition of entry. *Ante*, at 544. As a condition of entry, the traveler may be subjected to exhaustive processing and examinations, and his belongings may be scrutinized with exacting care.[35] I have no doubt as well that, *as a condition of entry*, travelers in appropriate circumstances may be required to excrete their bodily wastes for further scrutiny and to submit to diagnostic x rays.

Contrary to the Court's reasoning, however, the Government in carrying out such immigration and customs functions does not simply have the two stark alternatives of either forc-

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[34] See, *e. g.*, *United States* v. *Ramsey*, 431 U. S. 606, 616, 619 (1977); 3 LaFave § 10.5, at 276–295.

[35] See generally 8 U. S. C. § 1181 *et seq.*; 19 U. S. C. § 232 *et seq.*, § 1701 *et seq.*

ing a traveler to submit to such procedures or allowing him to "pass . . . into the interior." *Ante*, at 544. There is a third alternative: to instruct the traveler who refuses to submit to burdensome but reasonable conditions of entry that he is free to turn around and leave the country. In fact, I believe that the "reasonableness" of any burdensome requirement for entry is necessarily conditioned on the potential entrant's freedom to leave the country if he objects to that requirement. Surely the Government's manifest interest in preventing potentially excludable individuals carrying potential contraband from crossing our borders is fully vindicated if those individuals voluntarily decided not to cross the borders.

This does not, of course, mean that such individuals are not fully subject to the criminal laws while on American soil. If there is probable cause to believe they have violated the law, they may be arrested just like any other person within our borders. And if there is "reasonable suspicion" to believe they may be engaged in such violations, they may briefly be detained pursuant to *Terry* for further investigation, subject to the same limitations and conditions governing *Terry* stops anywhere else in the country.[36] But if such *Terry* suspicion does not promptly ripen into probable cause, such travelers must be given a meaningful choice: either agree to further detention as a condition of eventual entry, or leave the country.

The Government disagrees. We were advised at oral argument that it "definitely" is the policy of customs authorities "not to allow such people, if they're reasonably suspected of drug smuggling, to return before that suspicion can be checked out" and that, whether citizen, resident alien, or alien, "[w]e would not simply let them go back." Tr. of Oral Arg. 5, 48. The result is to sanction an authoritarian twilight zone on the border. The suspicious-looking traveler may not enter the country. Nor may he leave. Instead, he

[36] See, *e. g.*, *United States* v. *Place*, 462 U. S., at 707–710; *Florida* v. *Royer*, 460 U. S., at 499–500 (plurality opinion); *Dunaway* v. *New York*, 442 U. S. 200, 210–216 (1979).

is trapped on the border. Because he is on American soil, he is fully subject "to the criminal enforcement powers of the Federal Government." *Ante*, at 539, citing 19 U. S. C. § 482. But notwithstanding that he is on American soil, he is *not* fully protected by the guarantees of the Bill of Rights applicable everywhere else in the country. To be sure, a watered-down "reasonableness" requirement will technically govern such detentions, but it will accommodate itself to assaults on privacy and personal autonomy that would not for one moment pass constitutional muster anywhere else in the country and that would surely provide grounds for an open-and-shut damages action for violations of basic civil rights if conducted anywhere but on the border.

Nothing in the underlying premises of the "border exception" supports such a ring of unbridled authoritarianism surrounding freedom's soil. If the traveler does not wish to consent to prolonged detentions or intrusive examinations, the Nation's customs and immigration interests are fully served by sending the traveler on his way elsewhere. If the authorities nevertheless propose to detain the traveler for purposes of subjecting him to criminal investigation and possible arrest and punishment, they may do so only pursuant to constitutional safeguards applicable to everyone else in the country. See *Wong Wing* v. *United States*, 163 U. S., at 236–238; *Abel* v. *United States*, 362 U. S., at 250 (BRENNAN, J., dissenting).[37] Chief among those safeguards is the re-

[37] Although the Government now disavows those actions, see Tr. of Oral Arg. 5, 48, the customs authorities apparently sought to arrange to have De Hernandez flown either to Mexico or back to Colombia, but concluded that she would not be able to secure a flight for at least two days. See App. 18, 22, 28, 32; Serrato Declaration ¶ 17, App. 48; Gonzales Declaration ¶ 20, App. 55; Mendoza Declaration ¶¶ 8–10, App. 58. Even if the Government had not repudiated these efforts, it is clear that, as the District Court found, De Hernandez was subjected to exacting surveillance during this time for purposes of criminal investigation and possible arrest. *Id.*, at 37. See also Serrato Declaration ¶ 18, App. 48 ("I told her also that if while she is in our custody, if she discharges anything illegally internally, she will be

quirement that, except in limited circumstances not present here, custodial detentions occur only on probable cause. The probable-cause standard rests on "a practical, nontechnical conception affording the best compromise that has been found for accommodating" the "often opposing" interests of law enforcement and individual liberty. *Brinegar* v. *United States*, 338 U. S., at 176 (Jackson, J., dissenting). See also *New Jersey* v. *T. L. O.*, 469 U. S. 325, 361–362 (1985) (BRENNAN, J., dissenting). That standard obviously is not met, and was not met here, simply by courier profiles, "common rumor or report, suspicion, or even 'strong reason to suspect.'" *Henry* v. *United States*, 361 U. S. 98, 101 (1959). Because the contraband in this case was the fruit of the authorities' indefinite detention of Rosa de Hernandez without probable cause or a warrant, I would affirm the judgment of the Court of Appeals for the Ninth Circuit reversing her conviction.

III

In my opinion, allowing the Government to hold someone in indefinite, involuntary, incommunicado isolation without

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placed under arrest and transported to a jail ward and be unable to leave the United States").

The Government argues that giving a traveler the option of leaving the country rather than being forced to undergo lengthy custodial criminal investigations based on mere suspicion "is an unsatisfactory alternative because it would allow the suspect to escape apprehension and return to repeat his smuggling efforts another day. In addition, this approach would remove a disincentive to smuggling activity by materially reducing the risk of apprehension and prosecution." Brief for United States 17–18, n. 9. This is exactly the same argument made whenever courts enforce the safeguards of the Fourth Amendment, and we have consistently stressed that if constitutionally permissible investigative stops do not promptly uncover sufficient evidence to support an arrest, the detainee must be released as a necessary consequence of constitutional liberty. See, *e. g.*, *United States* v. *Place*, *supra*, at 709–710; *Florida* v. *Royer*, *supra*, at 499 (plurality opinion) ("the police [may not] seek to verify their suspicions by means that approach the conditions of arrest"); *Dunaway* v. *New York*, *supra*, at 211–216; *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881–882 (1975).

probable cause and a judicial warrant violates our constitutional charter whether the purpose is to extract ransom or to investigate suspected criminal activity. Nothing in the Fourth Amendment permits an exception for such actions at the Nation's border. It is tempting, of course, to look the other way in a case that so graphically illustrates the "veritable national crisis" caused by narcotics trafficking. *Ante*, at 538. But if there is one enduring lesson in the long struggle to balance individual rights against society's need to defend itself against lawlessness, it is that "[i]t is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end." *Davis* v. *United States*, 328 U. S., at 597 (Frankfurter, J., dissenting).

I dissent.

THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* UNION CARBIDE AGRICULTURAL PRODUCTS CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 84–497. Argued March 26, 1985—Decided July 1, 1985

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires manufacturers of pesticides, as a precondition for registering a pesticide, to submit research data to the Environmental Protection Agency (EPA) concerning the product's health, safety, and environmental effects, and authorizes EPA to use previously submitted data in considering an application for registration of a similar product by another registrant ("follow-on" registrant). Section 3(c)(1)(D)(ii) of FIFRA authorizes EPA to consider certain previously submitted data only if the "follow-on" registrant has offered to compensate the original registrant for use of the data, and provides for binding arbitration if the registrants fail to agree on compensation. The arbitrator's decision is subject to judicial review only for "fraud, misrepresentation, or other misconduct." Appellees, firms engaged in the development and marketing of chemicals used to manufacture pesticides, instituted proceedings in Federal District Court to challenge, *inter alia*, the constitutionality of the arbitration provisions on the ground that they violate Article III of the Constitution by allocating to arbitrators the functions of judicial officers and by limiting review by an Article III court. Appellees alleged that EPA had considered their research data in support of other registration applications, that one of the appellees (Stauffer Co.) had invoked the arbitration provisions of § 3(c)(1)(D)(ii) against a "follow-on" registrant, and that the arbitration award fell short of the compensation to which Stauffer Co. was entitled. The District Court held that the claims challenging the arbitration provisions were ripe for decision, and that those provisions violated Article III.

Held:

1. Appellees' Article III claims demonstrate sufficient ripeness to establish a concrete case or controversy. *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, distinguished. Appellees have an independent right to adjudication of their compensation claims in a constitutionally proper forum; their claim does not depend on the outcome of a given arbitration. It is sufficient for purposes of a claim under Article III challenging a tribunal's jurisdiction that the claimant demonstrate it has been or inev-

itably will be subjected to an exercise of such unconstitutional jurisdiction. In addition, the issue here is purely legal, and will not be clarified by further factual development. Appellees have standing to contest EPA's issuance of "follow-on" registrations pursuant to what they contend is an unconstitutional statutory provision. Pp. 579–582.

2. Article III does not prohibit Congress from selecting binding arbitration with only limited judicial review as the mechanism for resolving disputes among participants in FIFRA's pesticide registration scheme. Pp. 582–593.

(a) The Constitution does not require every federal question arising under the federal law to be tried in an Article III court before a judge enjoying life tenure and protection against salary reduction. Congress is not barred from acting pursuant to its Article I powers to vest decisionmaking authority in tribunals that lack the attributes of Article III courts. Pp. 582–584.

(b) Any right to compensation from "follow-on" registrants under § 3(c)(1)(D)(ii) for EPA's use of data arises under FIFRA and does not depend on or replace a right to such compensation under state law. Thus, the holding in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50—that Congress may not vest in a non-Article III court the power to adjudicate a traditional contract action arising under state law, without the litigants' consent, and subject only to ordinary appellate review—is not controlling here. Nor do this Court's decisions support appellees' contentions that Article III adjudication or review is required because FIFRA confers a "private right" to compensation (as distinguished from a "public right"), or that the right to an Article III forum is absolute unless the Federal Government is a party of record. Pp. 584–586.

(c) Practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III. *Crowell* v. *Benson*, 285 U. S. 22. If the identity of the parties alone determined the requirements of Article III, under appellees' theory the constitutionality of many quasi-adjudicative activities carried on by administrative agencies involving claims between individuals would be thrown into doubt. In essence, the "public rights" doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that could be conclusively determined by the Executive and Legislative Branches, the danger of encroaching on the judicial powers is reduced. Pp. 586–589.

(d) Several aspects of FIFRA establish that the arbitration scheme adopted by Congress does not contravene Article III. The right created by FIFRA as to use of a registrant's data to support a "follow-on" registration is not a purely "private" right, but bears many of the charac-

teristics of a "public" right. Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication. The arbitration scheme is necessary as a pragmatic solution to the difficult problem of spreading the costs of generating adequate information regarding the safety, health, and environmental impact of a potentially dangerous product. Additionally, the scheme contains its own sanctions and subjects no unwilling defendant to judicial enforcement power. Given the nature of the right at issue and the concerns motivating Congress, the arbitration system does not threaten the independent role of the judiciary in the constitutional scheme. In the circumstances, the limited Article III review of the arbitration proceeding preserves the appropriate exercise of the judicial function. Pp. 589–593.

3. Appellees' alternative Article I claim that FIFRA's standard for compensation is so vague as to be an unconstitutional delegation of legislative powers was neither adequately briefed nor argued to this Court and was not fully litigated before the District Court. Therefore, the issue is left open for determination on remand. P. 593.

Reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 594. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 602.

Deputy Solicitor General Wallace argued the cause for appellant. With him on the briefs were *Solicitor General Lee*, *Acting Assistant Attorney General Flint*, *Jerrold J. Ganzfried*, *Anne S. Almy*, *Jacques B. Gelin*, *John A. Bryson*, and *Gerald H. Yamada*.

Kenneth W. Weinstein argued the cause for appellees. With him on the brief were *Lawrence S. Ebner* and *Stanley W. Landfair*.*

**David B. Weinberg* and *William R. Weissman* filed a brief for Griffin Corp. et al. as *amici curiae* urging reversal.

Wilkes C. Robinson filed a brief for Gulf and Great Plains Legal Foundation as *amicus curiae* urging affirmance.

Thomas H. Truitt, *David R. Berz*, and *Jeffrey F. Liss* filed a brief for PPG Industries, Inc., as *amicus curiae*.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires the Court to revisit the data-consideration provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U. S. C. § 136 *et seq.*, which was considered last Term in *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984). *Monsanto* examined whether FIFRA's data-consideration provision effects an uncompensated taking in violation of the Fifth Amendment. In this case we address whether Article III of the Constitution prohibits Congress from selecting binding arbitration with only limited judicial review as the mechanism for resolving disputes among participants in FIFRA's pesticide registration scheme. We conclude it does not and reverse the judgment below.

I

The Court's opinion in *Monsanto* details the development of FIFRA from the licensing and labeling statute enacted in 1947 to the comprehensive regulatory statute of the present. This case, like *Monsanto*, concerns the most recent amendment to FIFRA, the Federal Pesticide Act of 1978, 92 Stat. 819 (1978 Act), which sought to correct problems created by the Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973 (1972 Act), itself a major revision of prior law. See *Ruckelshaus* v. *Monsanto Co.*, *supra*, at 991–992.

A

As a precondition for registration of a pesticide, manufacturers must submit research data to the Environmental Protection Agency (EPA) concerning the product's health, safety, and environmental effects. The 1972 Act established data-sharing provisions intended to streamline pesticide registration procedures, increase competition, and avoid unnecessary duplication of data-generation costs. S. Rep. No. 92–838, pp. 72–73 (1972) (1972 S. Rep.). Some evidence suggests that before 1972 data submitted by one registrant

had "as a matter of practice but without statutory authority, been considered by the Administrator to support the registration of the same or a similar product by another registrant." *Ruckelshaus* v. *Monsanto Co.*, *supra*, at 1009, n. 14. Such registrations were colloquially known as "me too" or "follow-on" registrations. Section 3(c)(1)(D) of the 1972 Act provided statutory authority for the use of previously submitted data as well as a scheme for sharing the costs of data generation.

> "In effect, the provision instituted a mandatory data-licensing scheme. The amount of compensation was to be negotiated by the parties, or, in the event negotiations failed, was to be determined by the EPA, subject to judicial review upon instigation of the original data submitter. The scope of the 1972 data-consideration provision, however, was limited, for any data designated as 'trade secrets or commercial or financial information' . . . could not be considered at all by EPA to support another registration unless the original submitter consented." *Ruckelshaus* v. *Monsanto Co.*, *supra*, at 992–993.

Congress enacted the original data-compensation provision in 1972 because it believed "recognizing a limited proprietary interest" in data submitted to support pesticide registrations would provide an added incentive beyond statutory patent protection for research and development of new pesticides. H. R. Rep. No. 95–663, pp. 17–18 (1977); S. Rep. No. 95–334, pp. 7, 34–40 (1977) (1977 S. Rep.). The data submitters, however, contended that basic health, safety, and environmental data essential to registration of a competing pesticide qualified for protection as a trade secret. With EPA bogged down in cataloging data and the pesticide industry embroiled in litigation over what types of data could legitimately be designated "trade secrets," new pesticide registrations "ground to a virtual halt." *Id.*, at 3.

The 1978 amendments were a response to the "logjam of litigation that resulted from controversies over data compensation and trade secret protection." *Ibid.* Congress viewed data-sharing as essential to the registration scheme, *id.*, at 7, but concluded EPA must be relieved of the task of valuation because disputes regarding the compensation scheme had "for all practical purposes, tied up their registration process" and "[EPA] lacked the expertise necessary to establish the proper amount of compensation." 123 Cong. Rec. 25709 (1977) (statement of Sen. Leahy, floor manager of S. 1678). Legislators and the Agency agreed that "[d]etermining the amount and terms of such compensation are matters that do not require active government involvement [and] compensation payable should be determined to the fullest extent practicable, within the private sector." *Id.*, at 25710.

Against this background, Congress in 1978 amended § 3(c)(1)(D) and § 10(b) to clarify that the trade secret exemption from the data-consideration provision did not extend to health, safety, and environmental data. In addition, the 1978 amendments granted data submitters a 10-year period of exclusive use for data submitted after September 30, 1978, during which time the data may not be cited without the original submitter's permission. § 3(c)(1)(D)(i).

Regarding compensation for use of data not protected by the 10-year exclusive use provision, the amendment substituted for the EPA Administrator's determination of the appropriate compensation a system of negotiation and binding arbitration to resolve compensation disputes among registrants. Section 3(c)(1)(D)(ii) authorizes EPA to consider data already in its files in support of a new registration, permit, or new use, but "only if the applicant has made an offer to compensate the original data submitter." If the applicant and data submitter fail to agree, either may invoke binding arbitration. The arbitrator's decision is subject to judicial review only for "fraud, misrepresentation, or other

misconduct." *Ibid.*[1] The statute contains its own sanctions. Should an applicant or data submitter fail to comply with the scheme, the Administrator is required to cancel the

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[1] The full text of § 3(c)(1)(D)(ii) reads:

"(ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintain in effect an existing registration, or for reregistration, the Administrator may, without the permission of the original data submitter consider any such item of data in support of an application by any other person (hereinafter in this chapter referred to as the 'applicant') within the fifteen year period following the date the data were originally submitted only if the applicant has made an offer to compensate the original data submitter and submitted such offer to the Administrator accompanied by evidence of delivery to the original data submitter of the offer. The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such an agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant, have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedures and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. The parties to the arbitration shall share equally in the payment of the fee and expenses of the arbitrator. If the Administrator determines that an original data submitter has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the original data submitter shall forfeit the right to compensation for the use of

new registration or to consider the data without compensation to the original submitter. The Administrator may also issue orders regarding sale or use of existing pesticide stocks. *Ibid.*

The concept of retaining statutory compensation but substituting binding arbitration for valuation of data by EPA emerged as a compromise. This approach was developed by representatives of the major chemical manufacturers, who sought to retain the controversial compensation provision, in discussions with industry groups representing follow-on registrants, whose attempts to register pesticides had been roadblocked by litigation since 1972. Hearings on Extending and Amending FIFRA before the Subcommittee on Department Investigations, Oversight, and Research of the House Committee on Agriculture, 95th Cong., 1st Sess., 522–523 (1977) (testimony of Robert Alikonis, General Counsel to Pesticide Formulators Association).

B

Appellees are 13 large firms engaged in the development and marketing of chemicals used to manufacture pesticides.

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the data in support of the application. Notwithstanding any other provision of this subchapter, if the Administrator determines that an applicant has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the Administrator shall deny the application or cancel the registration of the pesticide in support of which the data were used without further hearing. Before the Administrator takes action under either of the preceding two sentences, the Administrator shall furnish to the affected person, by certified mail, notice of intent to take action and allow fifteen days from the date of delivery of the notice for the affected person to respond. If a registration is denied or canceled under this subparagraph, the Administrator may make such order as the Administrator deems appropriate concerning the continued sale and use of existing stocks of such pesticide. Registration action by the Administrator shall not be delayed pending the fixing of compensation." 7 U. S. C. § 136a(c)(1)(D)(ii).

Each has in the past submitted data to EPA in support of registrations of various pesticides. When the 1978 amendments went into effect, these firms were engaged in litigation in the Southern District of New York challenging the constitutionality under Article I and the Fifth Amendment of the provisions authorizing data-sharing and disclosure of data to the public.[2] In response to this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982), appellees amended their complaint to allege that the statutory mechanism of binding arbitration for determining the amount of compensation due them violates Article III of the Constitution. Article III, § 1, provides that "[t]he judicial Power of the United States, shall be vested" in courts whose judges enjoy tenure "during good Behaviour" and compensation that "shall not be diminished during their Continuance in Office." Appellees allege Congress in FIFRA transgressed this limitation by allocating to arbitrators the functions of judicial officers and severely limiting review by an Article III court.

The District Court granted appellees' motion for summary judgment on their Article III claims. It found the issues ripe because the "statutory compulsion to seek relief through arbitration" raised a constitutionally sufficient case or contro-

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[2] Following the 1978 amendments, appellees amended their complaints to allege that the data-consideration and disclosure provisions effected a taking of their property without just compensation and without due process of law. The District Court granted a preliminary injunction against use of data submitted prior to 1978, *Amchem Products, Inc.* v. *Costle*, 481 F. Supp. 195 (1979), but the Second Circuit reversed for want of a showing of likelihood of success and this Court denied appellees' petition for a writ of certiorari. *Union Carbide Agricultural Products Co.* v. *Costle*, 632 F. 2d 1014 (1980), cert. denied, 450 U. S. 996 (1981). Appellees then amended their complaint to allege that the lack of valuation standards rendered the arbitration provision an unconstitutional delegation of legislative authority in violation of Article I. At the same time they stipulated to dismissal, without prejudice to a Court of Claims action, of their due process claims. Record, Doc. Nos. 1, 15, 19.

versy. Although troubled by what appeared a "standardless delegation of powers," the District Court did not reach the Article I issue because it held that Article III barred FIFRA's "absolute assignment of [judicial] power" to arbitrators with only limited review by Article III judges. *Union Carbide Agricultural Products Co.* v. *Ruckelshaus*, 571 F. Supp. 117, 124 (1983). The District Court, rather than striking down the statutory limitation on judicial review, enjoined the entire FIFRA data use and compensation scheme. App. to Juris. Statement 25a.

Appellant took a direct appeal to this Court pursuant to 28 U. S. C. § 1252. We vacated the judgment of the District Court and remanded for reconsideration in light of our supervening decision in *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984). *Ruckelshaus* v. *Union Carbide Agricultural Products Co.*, 468 U. S. 1201 (1984). In *Monsanto*, we ruled that FIFRA's data-consideration provisions may be deemed a "public use" even though the most direct beneficiaries of the regulatory scheme will be the later applicants. 467 U. S., at 1014. Insofar as FIFRA authorizes the Administrator to consider trade secrets submitted during the period between 1972 and 1978, a period during which the registrant entertained a reasonable, investment-backed expectation that its trade secret data would be held confidential, we held it effects a taking. But the data originator must complete arbitration and, in the event of a shortfall, exhaust its Tucker Act remedies against the United States before it can be ascertained whether it has been deprived of just compensation. The Court distinguished between the "ability to vindicate [the] constitutional right to just compensation" and the "ability to vindicate [the] statutory right to obtain compensation from a subsequent applicant." *Id.*, at 1019. But we declined to reach Monsanto's Article III claim, explaining:

> "Monsanto did not allege or establish that it had been injured by actual arbitration under the statute. While the District Court acknowledged that Monsanto had re-

ceived several offers of compensation from applicants for registration, it did not find that EPA had considered Monsanto's data in considering another application. Further, Monsanto and any subsequent applicant may negotiate and reach agreement concerning an outstanding offer. If they do not reach agreement, then the controversy must go to arbitration. Only after EPA has considered data submitted by Monsanto in evaluating another application and an arbitrator has made an award will Monsanto's claims with respect to the constitutionality of the arbitration scheme become ripe." *Ibid.* (citation omitted).

On remand in this case, appellees amended their complaint to reflect that EPA had, in fact, considered their data in support of other registration applications. The amended complaint also alleged that data submitted by appellee Stauffer Chemical Company (Stauffer), originator of the chemicals butylate and EPTC, had been used in connection with registrations by PPG Industries, Inc. (PPG), and Drexel Chemical Company of pesticides containing butylate and EPTC as active ingredients. App. 23. The complaint further alleged Stauffer had invoked the arbitration provisions of § 3(c)(1)(D)(ii) against PPG, and appellees entered in evidence the award of the arbitration panel, handed down on June 28, 1983. *Id.*, at 42. Stauffer claimed the arbitrators' award fell far short of the compensation to which it was entitled.[3]

[3] Shortly after the award was handed down, PPG filed an action against Stauffer and EPA in the District Court for the District of Columbia to set aside the award. Stauffer cross-claimed against EPA seeking to have the entire FIFRA data-compensation scheme invalidated as violative of Article III and counterclaimed against PPG seeking damages in the amount of the award should the statute be struck down or, in the alternative, enforcement of the award. *PPG Industries, Inc.* v. *Stauffer Chemical Co.*, Civil Action No. 83–1941 (DC, filed July 7, 1983); Record, Doc. No. 35. Should the scheme be upheld, Stauffer argues it is entitled to the award as the only option possible under FIFRA absent fraud or misconduct.

In view of these developments, the District Court concluded that "[t]he claims presented by Stauffer challenging the constitutionality of FIFRA § 3(c)(1)(D) are ripe for resolution under the criteria established by the Supreme Court" in *Ruckelshaus* v. *Monsanto Co.*, *supra*. The remaining plaintiffs, the District Court held, were aggrieved by the clear threat of compulsion to resort to unconstitutional arbitration. App. to Juris. Statement 1a–4a. The District Court reinstated its prior judgment enjoining the operation of the data-consideration provisions as violative of Article III. EPA again took a direct appeal and we noted probable jurisdiction. 469 U. S. 1032 (1984). This Court stayed the judgment pending disposition of the appeal.

II

As a threshold matter, we must determine whether appellees' Article III claims demonstrate sufficient ripeness to establish a concrete case or controversy. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 138–139 (1974). Appellant contends that the District Court erred in addressing these claims because the criteria established in *Monsanto* for ripeness remained unsatisfied. Appellant argues that only one firm, Stauffer, engaged in arbitration and it seeks to enforce rather than challenge the award. Appellees counter that they are aggrieved by the *threat* of an unconstitutional arbitration procedure which assigns the valuation of their data to civil arbitrators and prohibits judicial review of the amount of compensation. Stauffer in particular argues that it was doubly injured by the arbitration. Although it claimed a shortfall of some $50 million, it was precluded by § 3(c)(1)(D)(ii) from seeking judicial review of the award against PPG. While seeking to enforce the award should its Article III claim fail, Stauffer has consistently challenged the validity of the entire FIFRA data-consideration scheme both here and in litigation initiated by PPG. See n. 3, *supra*.

We agree that Stauffer has an independent right to adjudication in a constitutionally proper forum. See *Glidden Co.*

v. *Zdanok*, 370 U. S. 530, 533 (1962). Although appellees contend and the District Court found that they were injured by the shortfall in the award, it is sufficient for purposes of a claim under Article III challenging a tribunal's jurisdiction that the claimant demonstrate it has been or inevitably will be subjected to an exercise of such unconstitutional jurisdiction. See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S., at 56–57, aff'g 12 B. R. 946 (Minn. 1981) (reversing Bankruptcy Court's denial of pretrial motion to dismiss contract claim). "[A party] may object to proceeding further with [a] lawsuit on the grounds that if it is to be resolved by an agency of the United States, it may be resolved only by an agency which exercises '[t]he judicial power of the United States' described by Art. III of the Constitution." 458 U. S., at 89 (opinion concurring in judgment). In contrast to the Taking Clause claim in *Monsanto*, appellees' Article III injury is not a function of whether the tribunal awards reasonable compensation but of the tribunal's authority to adjudicate the dispute. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, *supra*; *Glidden Co.* v. *Zdanok*, *supra*. Thus appellees state an independent claim under Article III, apart from any monetary injury sustained as a result of the arbitration.

"[R]ipeness is peculiarly a question of timing." *Regional Rail Reorganization Act Cases*, *supra*, at 140. "[I]ts basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 148 (1967). The Article III challenge in *Monsanto* was, in this sense, premature. Monsanto had not alleged that its data had ever been considered in support of other registrations, much less that Monsanto had failed to reach a negotiated settlement or been forced to resort to an unconstitutional arbitration. In fact, no FIFRA arbitrations had as yet taken place when Monsanto brought its claim. Monsanto's claim thus involved "contingent future events that may not

occur as anticipated, or indeed may not occur at all." 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532 (1984). By contrast, the FIFRA data-consideration procedures are now in place and numerous follow-on registrations have been issued. See Brief for Appellees 3, n. 3 (citing Docket Entry No. 132, p. 2). Each of the appellees in this action has alleged as yet uncompensated use of its data. App. 23. Stauffer has engaged in an arbitration lasting many months and consuming 2,700 pages of transcript. There is no doubt that the "effects [of the arbitration scheme] have [been felt by Stauffer] in a concrete way." *Abbott Laboratories* v. *Gardner*, 387 U. S., at 148–149.

In addition, "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration" must inform any analysis of ripeness. *Id.*, at 149. The issue presented in this case is purely legal, and will not be clarified by further factual development. Cf. *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 201 (1983). Doubts about the validity of FIFRA's data-consideration and compensation schemes have plagued the pesticide industry and seriously hampered the effectiveness of FIFRA's reforms of the registration process. "To require the industry to proceed without knowing whether the [arbitration scheme] is valid would impose a palpable and considerable hardship." *Id.*, at 201–202. At a minimum Stauffer, and arguably each appellee whose data have been used pursuant to the challenged scheme, suffers the continuing uncertainty and expense of depending for compensation on a process whose authority is undermined because its constitutionality is in question. See *ibid.* "'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'" *Regional Rail Reorganization Act Cases*, 419 U. S., at 143,

quoting *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593 (1923). Nothing would be gained by postponing a decision, and the public interest would be well served by a prompt resolution of the constitutionality of FIFRA's arbitration scheme. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 82 (1978).

Finally, appellees clearly have standing to contest EPA's issuance of follow-on registrations pursuant to what they contend is an unconstitutional statutory provision. They allege an injury from EPA's unlawful conduct—the injury of being forced to choose between relinquishing any right to compensation from a follow-on registrant or engaging in an unconstitutional adjudication. *Allen* v. *Wright*, 468 U. S. 737 (1984). Appellees also allege injury which is likely to be redressed by the relief they request. *Ibid.* The use, registration, and compensation scheme is integrated in a single subsection that explicitly ties the follow-on registration to the arbitration. See § 3(c)(1)(D)(ii) (EPA "*shall* deny" or "cancel" follow-on registration if arbitration section is not complied with). It is evident that Congress linked EPA's authority to issue follow-on registrations to the original data submitter's ability to obtain compensation. A decision against the provision's constitutionality, therefore, would support remedies such as striking down the statutory restrictions on judicial review or enjoining EPA from issuing or retaining in force follow-on registrations pursuant to § 3(c)(1)(D)(ii).

III

Appellees contend that Article III bars Congress from requiring arbitration of disputes among registrants concerning compensation under FIFRA without also affording substantial review by tenured judges of the arbitrator's decision. Article III, § 1, establishes a broad policy that federal judicial power shall be vested in courts whose judges enjoy life tenure and fixed compensation. These requirements protect

the role of the independent judiciary within the constitutional scheme of tripartite government and assure impartial adjudication in federal courts. *United States* v. *Will*, 449 U. S. 200, 217–218 (1980); *Buckley* v. *Valeo*, 424 U. S. 1, 122 (1976) *(per curiam)*.

An absolute construction of Article III is not possible in this area of "frequently arcane distinctions and confusing precedents." *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S., at 90 (opinion concurring in judgment). "[N]either this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law . . . to be tried in an Art. III court before a judge enjoying life tenure and protection against salary reduction." *Palmore* v. *United States*, 411 U. S. 389, 407 (1973). Instead, the Court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts. See, *e. g.*, *Walters* v. *National Assn. of Radiation Survivors*, *ante*, p. 305 (Board of Veterans' Appeals); *Palmore* v. *United States*, *supra* (District of Columbia courts); *Crowell* v. *Benson*, 285 U. S. 22 (1932) (Deputy Commissioner of Employees' Compensation Commission); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856) (Treasury accounting officers). Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts. See, *e. g.*, 5 U. S. C. §§ 701(a)(1), 701(a)(2); *Heckler* v. *Chaney*, 470 U. S. 821, 837–838 (1985); *United States* v. *Erika, Inc.*, 456 U. S. 201, 206 (1982) (no review of Medicare reimbursements); Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 18 (1983) (administrative agencies can conclusively adjudicate claims created by the administrative state, by and against private persons); Redish, Legislative Courts, Administrative Agencies, and the *Northern Pipeline* Decision, 1983 Duke L. J. 197 (same).

The Court's most recent pronouncement on the meaning of Article III is *Northern Pipeline*. A divided Court was unable to agree on the precise scope and nature of Article III's limitations. The Court's holding in that case establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review. 458 U. S., at 84 (plurality opinion); *id.*, at 90–92 (opinion concurring in judgment); *id.*, at 92 (BURGER, C. J., dissenting).

A

Appellees contend that their claims to compensation under FIFRA are a matter of state law, and thus are encompassed by the holding of *Northern Pipeline*. We disagree. Any right to compensation from follow-on registrants under § 3 (c)(1)(D)(ii) for EPA's use of data results from FIFRA and does not depend on or replace a right to such compensation under state law. Cf. *Northern Pipeline Construction Co.*, *supra*, at 84 (plurality opinion) (contract claims at issue were matter of state law); *Crowell* v. *Benson*, *supra*, at 39–40 (replacing traditional admiralty negligence action with administrative scheme of strict liability). As a matter of state law, property rights in a trade secret are extinguished when a company discloses its trade secret to persons not obligated to protect the confidentiality of the information. See *Ruckelshaus* v. *Monsanto Co.*, 467 U. S., at 1002, citing R. Milgrim, Trade Secrets § 1.01[2] (1983). Therefore registrants who submit data with notice of the scheme established by the 1978 amendments, and its qualified protection of trade secrets as defined in § 10, can claim no property interest under state law in data subject to § 3(c)(1)(D)(ii). *Ruckelshaus* v. *Monsanto Co.*, *supra*, at 1005–1008. Cf. 21 U. S. C. §§ 348(a)(2), 376(a)(1); 21 CFR § 71.15 (1985); 21 CFR § 171.1(h) (1984) (data submitted under Food, Drug,

and Cosmetic Act is in public domain and follow-on registrants need not submit independent data). Nor do individuals who submitted data prior to 1978 have a right to compensation under FIFRA that depends on state law. To be sure, such users might have a claim that the new scheme results in a taking of property interests protected by state law. See 467 U. S., at 1013–1014. Compensation for any uncompensated taking is available under the Tucker Act. For purposes of compensation under FIFRA's regulatory scheme, however, it is the "mandatory licensing provision" that creates the relationship between the data submitter and the follow-on registrant, and federal law supplies the rule of decision. Cf. *Northern Pipeline Construction Co.*, *supra*, at 90 (opinion concurring in judgment).

Alternatively, appellees contend that FIFRA confers a "private right" to compensation, requiring either Article III adjudication or review by an Article III court sufficient to retain "the essential attributes of the judicial power." *Northern Pipeline Construction Co.*, *supra*, at 77, 85–86 (plurality opinion). This "private right" argument rests on the distinction between public and private rights drawn by the plurality in *Northern Pipeline*. The *Northern Pipeline* plurality construed the Court's prior opinions to permit only three clearly defined exceptions to the rule of Article III adjudication: military tribunals, territorial courts, and decisions involving "public" as opposed to "private" rights. Drawing upon language in *Crowell* v. *Benson*, *supra*, at 50, the plurality defined "public rights" as "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." 458 U. S., at 67–68. It identified "private rights" as "'the liability of one individual to another under the law as defined.'" *Id.*, at 69–70, quoting *Crowell* v. *Benson*, 285 U. S., at 51.

This theory that the public rights/private rights dichotomy of *Crowell* and *Murray's Lessee* v. *Hoboken Land & Im-*

provement Co., 18 How. 272 (1856), provides a bright-line test for determining the requirements of Article III did not command a majority of the Court in *Northern Pipeline*. Insofar as appellees interpret that case and *Crowell* as establishing that the right to an Article III forum is absolute unless the Federal Government is a party of record, we cannot agree. Cf. *Northern Pipeline Construction Co.*, 458 U. S., at 71 (plurality opinion) (noting that discharge in bankruptcy, which adjusts liabilities between individuals, is arguably a public right). But see *id.*, at 69, n. 23. Nor did a majority of the Court endorse the implication of the private right/public right dichotomy that Article III has no force simply because a dispute is between the Government and an individual. Compare *id.*, at 68, n. 20, with *id.*, at 70, n. 23.

B

Chief Justice Hughes, writing for the Court in *Crowell*, expressly rejected a formalistic or abstract Article III inquiry, stating:

> "In deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority to prescribe procedure . . . , *regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required.*" 285 U. S., at 53 (emphasis added).

Crowell held that Congress could replace a seaman's traditional negligence action in admiralty with a statutory scheme of strict liability. In response to practical concerns, Congress rejected adjudication in Article III courts and instead provided that claims for compensation would be determined in an administrative proceeding by a deputy commissioner appointed by the United States Employees' Compensation Commission. *Id.*, at 43. "[T]he findings of the deputy commissioner, supported by evidence and within the scope of his authority" were final with respect to injuries to employees within the purview of the statute. *Id.*, at 46. Although

such findings clearly concern obligations among private parties, this fact did not make the scheme invalid under Article III. Instead, after finding that the administrative proceedings satisfied due process, *id.*, at 45–48, *Crowell* concluded that the judicial review afforded by the statute, including review of matters of law, "provides for the appropriate exercise of the judicial function in this class of cases." *Id.*, at 54.

The enduring lesson of *Crowell* is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III. Cf. *Glidden Co.* v. *Zdanok*, 370 U. S., at 547–548. The extent of judicial review afforded by the legislation reviewed in *Crowell* does not constitute a minimal requirement of Article III without regard to the origin of the right at issue or the concerns guiding the selection by Congress of a particular method for resolving disputes. In assessing the degree of judicial involvement required by Article III in this case, we note that the statute considered in *Crowell* is different from FIFRA in significant respects. Most importantly, the statute in *Crowell* displaced a traditional cause of action and affected a pre-existing relationship based on a common-law contract for hire. Thus it clearly fell within the range of matters reserved to Article III courts under the holding of *Northern Pipeline*. See 458 U. S., at 70–71, and n. 25 (plurality opinion) (noting that matters subject to a "suit at common law or in equity or admiralty" are at "protected core" of Article III judicial powers); *id.*, at 90 (opinion concurring in judgment) (noting that state law contract actions are "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789").

If the identity of the parties alone determined the requirements of Article III, under appellees' theory the constitutionality of many quasi-adjudicative activities carried on by administrative agencies involving claims between individuals would be thrown into doubt. See 5 K. Davis, Administrative Law § 29:23, p. 443 (2d ed. 1984) (concept described as

"revolutionary"); Note, A Literal Interpretation of Article III Ignores 150 Years of Article I Court History: *Marathon Oil Pipeline Co.* v. *Northern Pipeline Construction Co.*, 19 New England L. Rev. 207, 231–232 (1983) ("public rights doctrine exalts form over substance"); Note, The Supreme Court, 1981 Term, 96 Harv. L. Rev. 62, 262, n. 39 (1982). For example, in *Switchmen* v. *National Mediation Board*, 320 U.S. 297 (1943), cited with approval in *South Carolina* v. *Katzenbach*, 383 U. S. 301, 333 (1966), the Court upheld as constitutional a provision of the Railway Labor Act that established a "right" of a majority of a craft or class to choose its bargaining representative and vested the resolution of disputes concerning representation solely in the National Mediation Board, without judicial review. The Court concluded:

> "The Act . . . writes into law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for purposes of this Act.' That 'right' is protected by [a provision] which gives the Mediation Board the power to resolve controversies concerning it . . . . A review by the federal district courts of the Board's determination is not necessary to preserve or protect that 'right.' Congress for reasons of its own decided upon the method for protection of the 'right' which it created." 320 U. S., at 300–301.

See also *Union Pacific R. Co.* v. *Price*, 360 U. S. 601, 608 (1959); *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131, 135 (1944) (Board's conclusions reviewable for rational basis and warrant in the record). Cf. *Leedom* v. *Kyne*, 358 U. S. 184, 199 (1958), (BRENNAN, J., dissenting) (discussing *Switchmen*).

The Court has treated as a matter of "public right" an essentially adversary proceeding to invoke tariff protections against a competitor, as well as an administrative proceeding to determine the rights of landlords and tenants. See *Atlas*

Roofing Co. v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 454–455 (1977), citing as an example of "public rights" the federal landlord/tenant law discussed in *Block* v. *Hirsh*, 256 U. S. 135 (1921); *Ex parte Bakelite Corp.*, 279 U. S. 438, 447 (1929) (tariff dispute). These proceedings surely determine liabilities of individuals. Such schemes would be beyond the power of Congress under appellees' interpretation of *Crowell*. In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that "could be conclusively determined by the Executive and Legislative Branches," the danger of encroaching on the judicial powers is reduced. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S., at 68 (plurality opinion), citing *Crowell* v. *Benson*, 285 U. S., at 50.

C

Looking beyond form to the substance of what FIFRA accomplishes, we note several aspects of FIFRA that persuade us the arbitration scheme adopted by Congress does not contravene Article III. First, the right created by FIFRA is not a purely "private" right, but bears many of the characteristics of a "public" right. Use of a registrant's data to support a follow-on registration serves a public purpose as an integral part of a program safeguarding the public health. Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication. It also has the power to condition issuance of registrations or licenses on compliance with agency procedures. Article III is not so inflexible that it bars Congress from shifting the task of data valuation from the agency to the interested parties. Cf. *United States* v. *Erika, Inc.*, 456 U. S., at 203 (private insurance carrier assigned task of deciding Medicare claims); *Crowell* v. *Benson*, *supra*, at 50–51.

The 1978 amendments represent a pragmatic solution to the difficult problem of spreading the costs of generating adequate information regarding the safety, health, and environmental impact of a potentially dangerous product. Congress, without implicating Article III, could have authorized EPA to charge follow-on registrants fees to cover the cost of data and could have directly subsidized FIFRA data submitters for their contributions of needed data. See *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38, 49–53 (1936) (ratemaking is an essentially legislative function). Instead, it selected a framework that collapses these two steps into one, and permits the parties to fix the amount of compensation, with binding arbitration to resolve intractable disputes. Removing the task of valuation from agency personnel to civilian arbitrators, selected by agreement of the parties or appointed on a case-by-case basis by an independent federal agency, surely does not diminish the likelihood of impartial decisionmaking, free from political influence. See 29 CFR § 1404.4, pt. 1440, App. § 7 (1984). Cf. *Northern Pipeline*, 458 U. S., at 58 (plurality opinion); *id.*, at 115–116 (WHITE, J., dissenting).

The near disaster of the FIFRA 1972 amendments and the danger to public health of further delay in pesticide registration led Congress to select arbitration as the appropriate method of dispute resolution. Given the nature of the right at issue and the concerns motivating the Legislature, we do not think this system threatens the independent role of the Judiciary in our constitutional scheme. "To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell* v. *Benson*, *supra*, at 46. Cf. *Palmore* v. *United States*, 411 U. S., at 407–408 (the requirements of Art. III must in proper circumstances give way to accommodate plenary

grants of power to Congress to legislate with respect to specialized areas); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How., at 282 (citing "[i]mperative necessity" to justify summary tax collection procedures).

We note as well that the FIFRA arbitration scheme incorporates its own system of internal sanctions and relies only tangentially, if at all, on the Judicial Branch for enforcement. See *supra*, at 574–575. The danger of Congress or the Executive encroaching on the Article III judicial powers is at a minimum when no unwilling defendant is subjected to judicial enforcement power as a result of the agency "adjudication." See, *e. g.*, Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953), reprinted in P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 330 (2d ed. 1973); Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 16 (1983); L. Jaffe, Judicial Control of Administrative Action 385 (1965) (historically judicial review of agency decisionmaking has been required only when it results in the use of judicial process to enforce an obligation upon an unwilling defendant).

We need not decide in this case whether a private party could initiate an action in court to enforce a FIFRA arbitration. But cf. 29 CFR pt. 1440, App. § 37(c) (1984) (under rules of American Arbitration Association, parties to arbitration are deemed to consent to entry of judgment). FIFRA contains no provision explicitly authorizing a party to invoke judicial process to compel arbitration or enforce an award. Compare § 3(c)(1)(D)(ii), 7 U. S. C. § 136a(c)(1)(D)(ii), with § 10(c), 7 U. S. C. § 136h(c) (authorizing applicant or registrant to institute action in district court to settle dispute with Administrator over trade secrets); 29 U. S. C. § 1401 (b)(2) (Employee Retirement Income Security Act provision authorizing parties to arbitration to bring enforcement action in district court); *Union Pacific R. Co.* v. *Price*, 360 U. S.,

at 614, and n. 12 (statute authorized court enforcement of National Railroad Adjustment Board's money damages award); and *Crowell* v. *Benson*, 285 U. S., at 44 (providing for entry of judgment in federal court). Cf. *Utility Workers* v. *Edison Co.*, 309 U. S. 261 (1940) (as award to worker vindicates a "public right," agency alone has authority to institute enforcement proceeding). In any event, under FIFRA, the only potential object of judicial enforcement power is the follow-on registrant who explicitly consents to have his rights determined by arbitration. See 40 CFR § 162.9–5(b) (1984) (registration application must contain a written offer to pay compensation "to the extent required by FIFRA section 3(c)(1)(D)").

Finally, we note that FIFRA limits but does not preclude review of the arbitration proceeding by an Article III court. We conclude that, in the circumstances, the review afforded preserves the "appropriate exercise of the judicial function." *Crowell* v. *Benson*, *supra*, at 54. FIFRA at a minimum allows private parties to secure Article III review of the arbitrator's "findings and determination" for fraud, misconduct, or misrepresentation. § 3(c)(1)(D)(ii). This provision protects against arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under the governing law. Cf. *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597 (1960) (arbitrator must be faithful to terms of mandate and does not sit to administer his "own brand of industrial justice"). Moreover, review of constitutional error is preserved, see *Walters* v. *National Assn. of Radiation Survivors*, *ante*, at 311, n. 3; *Johnson* v. *Robison*, 415 U. S. 361, 367–368 (1974), and FIFRA, therefore, does not obstruct whatever judicial review might by required by due process. Cf. *Crowell* v. *Benson*, 285 U. S., at 46; *id.*, at 87 (Brandeis, J., dissenting). We need not identify the extent to which due process may require review of determinations by the arbitrator because the parties stipulated below to

abandon any due process claims.[4] See n. 2, *supra*. For purposes of our analysis, it is sufficient to note that FIFRA does provide for limited Article III review, including whatever review is independently required by due process considerations.

IV

Appellees raise Article I as an alternative ground for sustaining the judgment of the District Court. Cf. *Dandridge* v. *Williams*, 397 U. S. 471, 475, n. 6 (1970). Appellees argued below that FIFRA's standard for compensation is so vague as to be an unconstitutional delegation of legislative powers. See *A. L. A. Schecter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935). A term that appears vague on its face "may derive much meaningful content from the purpose of the Act, its factual background, and the statutory context." *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 104 (1946). Although FIFRA's language does not impose an explicit standard, the legislative history of the 1972 and 1978 amendments is far from silent. See, *e. g.*, S. Conf. Rep. No. 95–1188, p. 29 (1978); 1977 S. Rep., at 4, 8, 31; 1972 S. Rep., pt. 2, pp. 69, 72–73; Hearings on Extending and Amending FIFRA before the Subcommittee on Department Investigations, Oversight, and Research of the House Committee on Agriculture, 95th Cong., 1st Sess., *passim* (1977). The Article I claim, however, was neither adequately briefed nor argued to this Court and was not fully litigated before the District Court. Without expressing any opinion on the merits, we leave the issue open for determination on remand.

V

Our holding is limited to the proposition that Congress, acting for a valid legislative purpose pursuant to its con-

[4] As noted *supra*, at 585, appellees retain Tucker Act claims in the District Courts or in the United States Claims Court with review in the Court of Appeals for the Federal Circuit for any shortfall between the arbitration award and the value of trade secrets submitted between 1972 and 1978.

stitutional powers under Article I, may create a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary. To hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme. For the reasons stated in our opinion, we hold that arbitration of the limited right created by FIFRA § 3(c)(1)(D)(ii) does not contravene Article III. The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in the judgment.

Our cases of both recent and ancient vintage have struggled to pierce through the language of Art. III of the Constitution to the full meaning of the deceptively simple requirement that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. We know that those who framed our Constitution feared the tyranny of "accumulation of all powers, legislative, executive, and judiciary, in the same hands," The Federalist No. 47, p. 300 (H. Lodge ed. 1888) (J. Madison), and sought to guard against it by dispersing federal power to three interdependent branches of Government. Each branch of Government was intended to exercise a distinct but limited power and function as a check on any aggrandizing tendencies in the other branches. See *Buckley* v. *Valeo*, 424 U. S. 1, 122 (1976) *(per curiam)*. The salary and tenure guarantees of Art. III—reflecting Hamilton's observation that "a power over a man's subsistence amounts

to a power over his will," The Federalist No. 79, p. 491 (H. Lodge ed. 1888)—were thought essential to the Judiciary's ability to function effectively as a check on Congress and the Executive. It is thus clear that when Congress establishes courts pursuant to Art. III the judges presiding in those courts must receive salary and tenure guarantees. The difficult question is to what extent the need to preserve the Judiciary's checking function requires Congress to assign the Federal Government's decisionmaking authority to independent tribunals so constituted.

Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982), is the Court's most recent attempt at defining the limits Art. III places on the power of Congress to assign adjudicative authority to decisionmakers not protected by tenure and salary guarantees. We faced the question whether, under the federal Bankruptcy Act of 1978, 92 Stat. 2549, a federal bankruptcy court whose decisionmaker did not benefit from those guarantees could be empowered to render the entire initial adjudication of a state common-law cause of action. The issue was, in other words, whether Art. III permitted assignment of any essential attributes of the "judicial Power" to a non-Art. III federal decisionmaker when state law prescribed the rule of decision in a dispute between private parties. The Court invalidated the congressional action but a majority did not agree upon a common rationale. The plurality would have held that this allocation of decisional authority could not be justified as a proper exercise of either the congressional power to create Art. I legislative courts or the congressional power to create adjuncts to Art. III courts. 458 U. S., at 63–87. JUSTICE REHNQUIST, in a concurring opinion joined by JUSTICE O'CONNOR, would simply have held that Congress may not assign the power to adjudicate a traditional state common-law action to a non-Art. III tribunal even given the "traditional appellate review" by an Art. III court afforded under the challenged bankruptcy statute. *Id.*, at 90–91.

Because the appellees in *Northern Pipeline* had argued that bankruptcy court jurisdiction over state-law contract claims could be justified as an exercise of Congress' Art. I power to create legislative courts, the plurality examined the basis and scope of that congressional power as it has been explicated in our precedents. The plurality concluded that notwithstanding the commands of Art. III Congress could create such legislative courts for three categories of cases: territorial courts, courts-martial, and courts that adjudicate public rights disputes. The only serious question in *Northern Pipeline* was whether the disputed bankruptcy court jurisdiction fell into the third category.

The plurality opinion concluded that public rights cases, as that concept had come to be understood, involved disputes arising from the Federal Government's administration of its laws or programs.[1] 458 U. S., at 68–69. The plurality

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[1] In *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929), public rights disputes were described as those "which may be . . . committed exclusively to executive officers." *Id.*, at 458. In this regard it is worth noting that early cases recognizing a public rights doctrine typically involved either challenges to Government action affecting private interests in which at the time no constitutional claim of entitlement was recognized, *e. g.*, *United States* v. *Babcock*, 250 U. S. 328, 331 (1919); *Decatur* v. *Paulding*, 14 Pet. 497 (1840), or challenges by one private party seeking exercise of the Federal Government's enforcement authority against another private party not before the court, *e. g.*, *Ex parte Bakelite Corp.*, *supra*. The original theory would seem to have been that because Congress had absolute power to dispose of such issues as it saw fit without resort to the Judiciary, it could assign decisionmaking authority to Art. I courts.

The underpinnings of the original theory, of course, have not survived intact. We now recognize an entitlement in certain forms of government assistance. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970). And we have recently made clear that government is not free to dispose of individual claims of entitlement in any manner it deems fit. *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532 (1985). Also, such reasoning is not consistent with the doctrine of unconstitutional conditions. See *Speiser* v. *Randall*, 357 U. S. 513 (1958). The erosion of these underpinnings does not, however, mandate the conclusion that disputes arising in the administration of federal regulatory programs may not be resolved

expressly disclaimed any intention to provide a generally applicable definition of "public rights" but concluded that at a minimum public rights disputes must arise "'between the Government and others.'" *Id.*, at 69, quoting *Ex parte Bakelite Corp.*, 279 U. S. 438, 458 (1929). The dispute at issue in *Northern Pipeline* was found by the plurality not to fall into the public rights category because state law created the right and provided the rule of decision as between the private parties litigating the dispute, irrespective of the existence of the federal bankruptcy scheme. 458 U. S., at 72, n. 26 ("Even in the absence of the federal scheme, the plaintiff would be able to proceed against the defendant on the state-law contractual claims"). In no sense could the dispute be said to be about the propriety or accuracy of a determination made by an organ of the Federal Government in administration or execution of a federal regulatory scheme. Whatever the precise scope of the public rights doctrine, that case was clearly outside it and therefore adjudication before an Art. III decisionmaker or properly constituted adjunct was required.[2] Because the challenged bankruptcy jurisdiction could not be sustained on the alternative rationale that it was a proper adjunct to an Art. III court, *id.*, at 77–86 (plurality opinion); *id.*, at 91 (REHNQUIST, J., concurring in judgment), the statute embodying the jurisdictional grant was declared unconstitutional.

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through Art. I adjudication. The term "public rights" as now understood encompasses those "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," *Northern Pipeline*, 458 U. S., at 67–68, that need not be fully adjudicated in an Art. III forum or a properly constituted adjunct to such a forum.

[2] "What clearly remains subject to Art. III are all private adjudications in federal courts within the States—matters from their nature subject to a 'suit at common law or in equity or admiralty.' . . . There is no doubt that when the Framers assigned the 'judicial Power' to an independent Art. III Branch, these matters lay at what they perceived to be the protected core of that power." *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, *supra*, at 70–71, n. 25.

Analysis of the present case properly begins with the recognition that it differs substantially from the issue in *Northern Pipeline*. The present case arises entirely within the regulatory confines of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U. S. C. § 136 *et seq.* This federal statute prescribes both the terms of compensation and the procedures for arriving at the proper amount of compensation in any given case. See 7 U. S. C. § 136a(c)(1)(D)(ii) (providing for negotiation followed by binding arbitration to set amounts "follow-on" registrants must pay in compensation for use of test data). Thus the question for decision here is whether fixing the amount of compensation for test data under FIFRA can be characterized as a public rights dispute that need not be adjudicated from the outset in an Art. III court or a properly constituted adjunct to such a court.[3] Should it be concluded that this is such a dispute, the further issue must be confronted of whether some form of appellate oversight by an Art. III court is nonetheless required, see *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 455, n. 13 (1977), and, if so, whether this statute's provision of review only for "fraud, misrepresentation, or other misconduct" suffices. 7 U. S. C. § 136a(c)(1)(D)(ii).

I agree with the Court that the determinative factor with respect to the proper characterization of the nature of the dispute in this case should not be the presence or absence of the Government as a party. See *ante*, at 586. Despite the Court's contrary suggestions, the plurality opinion in *Northern Pipeline* suggests neither that "the right to an Article III forum is absolute unless the Federal Government is a party of record" nor that "Article III has no force simply because a dispute is between the Government and an individual."

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[3] As the Court correctly concludes, there is no tenable argument that appellees in this case will be forced to undergo an Art. I adjudication of a state-law claim that arises between private parties, as was the case in *Northern Pipeline*. See *ante*, at 584–585.

Ante, at 586. Properly understood, the analysis elaborated by the plurality in *Northern Pipeline* does not place the Federal Government in an Art. III straitjacket whenever a dispute technically is one between private parties. We recognized that a bankruptcy adjudication, though technically a dispute among private parties, may well be properly characterized as a matter of public rights. 458 U. S., at 50. The plurality opinion's reaffirmation of the constitutionality of the administrative scheme at issue in *Crowell* v. *Benson*, 285 U. S. 22 (1932), similarly suggests that a proper interpretation of Art. III affords the Federal Government substantial flexibility to rely on administrative tribunals. See *Northern Pipeline*, 458 U. S., at 69, n. 22, 78–80. The plurality opinion should not be read to imply that reliance on administrative agencies for ratemaking or other forms of regulatory adjustments of private interests is necessarily suspect. Cf. *Leedom* v. *Kyne*, 358 U. S. 184, 191 (1958) (BRENNAN, J., dissenting).

Nor does the approach of the *Northern Pipeline* plurality opinion permit Congress to sap the Judiciary of all its checking power whenever the Government is a party. The opinion made clear that "the presence of the United States as a proper party to the proceeding is . . . not [a] sufficient means of distinguishing 'private rights' from 'public rights.'" 458 U. S., at 69, n. 23. At a minimum, Art. III must bar Congress from assigning to an Art. I decisionmaker the ultimate disposition of challenges to the constitutionality of Government action, either legislative or executive. Cf. *United States* v. *Raddatz*, 447 U. S. 667, 708–712 (1980) (MARSHALL, J., dissenting). Also, the plurality opinion was careful to leave open the question whether and to what extent even the resolution of public rights disputes might require some eventual review in an Art. III court in the exercise of its responsibility to check an impermissible accumulation of power in the other branches of Government. 458 U. S., at 70, n. 23; see also *id.*, at 115 (WHITE, J., dissenting) ("[A] scheme of

Art. I courts that provides for appellate review by Art. III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court"); *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, *supra*, at 455, n. 13. Because the approach of the plurality opinion in *Northern Pipeline* is sufficiently flexible to accommodate the demands of contemporary Government while preserving the constitutional system of checks and balances, I adhere to it as the proper analysis for resolving the present case.

Though the issue before us in this case is not free of doubt, in my judgment the FIFRA compensation scheme challenged in this case should be viewed as involving a matter of public rights as that term is understood in the line of cases culminating in *Northern Pipeline*. In one sense the question of proper compensation for a follow-on registrant's use of test data is, under the FIFRA scheme, a dispute about "the liability of one individual to another under the law as defined," *Crowell* v. *Benson*, *supra*, at 51 (defining matters of private right). But the dispute arises in the context of a federal regulatory scheme that virtually occupies the field. Congress has decided that effectuation of the public policies of FIFRA demands not only a requirement of compensation from "follow-on" registrants in return for mandatory access to data but also an administrative process—mandatory negotiation followed by binding arbitration—to ensure that unresolved compensation disputes do not delay public distribution of needed products. This case, in other words, involves not only the congressional prescription of a federal rule of decision to govern a private dispute but also the active participation of a federal regulatory agency in resolving the dispute. Although a compensation dispute under FIFRA ultimately involves a determination of the duty owed one private party by another, at its heart the dispute involves the exercise of authority by a Federal Government arbitrator in the course of administration of FIFRA's comprehensive regulatory

scheme. As such it partakes of the characteristics of a standard agency adjudication. Cf. *Leedom* v. *Kyne*, *supra*, at 191 (BRENNAN, J., dissenting).[4]

Given that this dispute is properly understood as one involving a matter in which Congress has substantial latitude to make use of Art. I decisionmakers, the question remains whether the Constitution nevertheless imposes some requirement of Art. III supervision of the arbitrator's decisions under this scheme. In this case Congress has provided for review of arbitrators' decisions to ensure against "fraud, misrepresentation, or other misconduct." The Court therefore need not reach the difficult question whether Congress is always free to cut off all judicial review of decisions respecting such exercises of Art. I authority.

The review prescribed under FIFRA encompasses the authority to invalidate an arbitrator's decision when that decision exceeds the arbitrator's authority or exhibits a manifest disregard for the governing law. See *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597 (1960); *Wilko* v. *Swan*, 346 U. S. 427, 436–437 (1953). Such review preserves the judicial authority over questions of law in the present context. Cf. *Crowell* v. *Benson*, *supra*, at 54. In essence, the FIFRA scheme delegates a significant case-

[4] Although the essential function of the Judiciary is to "say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), the exercise of this power with respect to the interpretation of federal statutory law may not be the power that constrains the actions of the Legislative Branch. Congress is always free to reject this Court's interpretation of a federal statute by passing a new law. It may rather be that the exercise of the Court's power of judicial review to ensure constitutionality is what restrains the exercise of legislative power. The power to interpret federal statutory law could be seen as acting as a check on the exercise of the executive power—or the power of administrative agencies whether or not they are considered as under the head of executive authority—given that what courts do when they review agency action, both rulemaking and adjudication, is ensure that the reviewed action has not departed from congressional intent.

by-case lawmaking function to the arbitrator in compensation disputes. So long as this delegation is constitutionally permissible—an issue left open on remand—and judicial review to ensure that the arbitrator's exercise of authority in any given case does not depart from the mandate of the delegation, the Judiciary will exercise a restraining authority sufficient to meet whatever requirements Art. III might impose in the present context.[5]

For these reasons, I agree with the Court that the FIFRA arbitration scheme does not violate the mandates of Art. III, and I would therefore reverse the judgment of the District Court and remand for further proceedings.

JUSTICE STEVENS, concurring in the judgment.

This appeal presents a question under Article III, but one which differs from that addressed by the Court and whose answer prevents me from reaching the merits of appellees' claims.

Appellees, plaintiffs in the District Court, challenge the constitutionality of an "arbitration procedure that [allegedly] violates their right to an adjudication that complies with" Article III insofar as it empowers civilian arbitrators to determine the amount of compensation they are entitled to receive for use of their research data. Amended Complaint for Declaratory Judgment and Injunction ¶¶20–21, App. 23–24. The relief they claim against the Environmental Protection Agency and its Administrator (collectively referred to as the agency, EPA, or the Administrator) is a declaration of unconstitutionality and an injunction against use of their data in the agency's processing of applications filed by third parties. See *id.*, at 24.

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[5] It is also important to note that the Due Process Clause of the Fifth Amendment imposes, as the Court correctly notes, independent constraints on the ability of Congress to establish particular forums for dispute resolution under Art. I. See *ante*, at 592. Cf. *Crowell* v. *Benson*, 285 U. S., at 87 (Brandeis, J., dissenting).

In § 3(c)(1)(D)(ii) of the Federal Insecticide, Fungicide, and Rodenticide Act,[1] Congress provided appellees with a contingent form of protection against the EPA's use of certain of their research data: "[T]he Administrator may, without the permission of the original data submitter, consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the 'applicant') . . . *only if* the applicant has made an offer to compensate the original data submitter . . . ." 92 Stat. 821, 7 U. S. C. § 136a(c)(1)(D)(ii) (emphasis added). Appellees' research data may not be used to process a third party's application unless that party offers to compensate appellees in an amount that is "fixed by agreement between the original data submitter and the applicant, or, failing such agreement, binding arbitration." *Ibid.* But if the third party consents to this procedure for determining the appropriate compensation, there is no statutory restraint on EPA's use of the data.[2]

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[1] The text of § 3(c)(1)(D)(ii) is quoted in full *ante*, at 574–575, n. 1.

[2] Under appellees' reading of § 3(c)(1)(D)(ii), compensation is a condition precedent to EPA's use of their research data to evaluate applications by third parties. See Amended Complaint for Declaratory Judgment and Injunction ¶ 20, App. 23. Because the statutorily required arbitration procedure violates Article III, they reason, compensation cannot be awarded and the condition precedent to EPA's use of data cannot be fulfilled. *Ergo*, an injunction must issue against the agency.

Appellees, however, misread the statute. Section 3(c)(1)(D)(ii) conditions the Administrator's use of their data on a third party's "*offer* to compensate," not upon actual compensation. 92 Stat. 821, 7 U. S. C. § 136a(c)(1)(D)(ii) (emphasis added); accord, § 3(c)(1)(D)(iii), 92 Stat. 822, 7 U. S. C. § 136a(c)(1)(D)(iii). Indeed, the same section later provides that "[r]egistration action by the Administrator shall not be delayed pending the fixing of compensation." 92 Stat. 822, 7 U. S. C. § 136a(c)(1)(D)(ii). A straightforward reading of this section demonstrates that EPA is not disabled from using research data to process "follow-on" registrations pending compensation of appellees. I find nothing in the legislative history that contradicts this interpretation, and it is consistent with Congress' "vie[w] [of] data-sharing as essential to the registration scheme," *ante*, at

Appellees make no claim that the Administrator has used any of their data without obtaining the consent required by the statute. Thus, the statute provides no basis for any relief against EPA. And if we should declare § 3(c)(1)(D)(ii) unconstitutional, there is no other basis of which I am aware

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573, and with the Legislature's consequent desire to break "the 'logjam of litigation that resulted from controversies over data compensation and trade secret protection,'" *ibid.* (quoting S. Rep. No. 95–334, p. 3 (1977)). See *id.*, at 3 ("The single largest problem is the fact that the registration and reregistration process has ground to a virtual halt. . . . Since registration is critical, this program must be made to work"). Congress surely desired both that EPA have use of appellees' data and that appellees be compensated for such use. But there is no evidence to indicate that Congress intended these complementary provisions to be mutually dependent. See § 30, 92 Stat. 836, 7 U. S. C. § 136x ("If any provision of this [Act] . . . is held invalid, the invalidity shall not affect other provisions . . . which can be given effect without regard to the invalid provision . . . and to this end the provisions of this [Act] are severable"); cf. *INS* v. *Chadha*, 462 U. S. 919, 931–935 (1983).

The sentence the Court believes "ties the follow-on registration to the arbitration," *ante*, at 582, is beside the point. Section 3(c)(1)(D)(ii) requires the Administrator to "deny the application or cancel the registration of the pesticide" if the third-party "follow-on" applicant "has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation." 92 Stat. 821, 7 U. S. C. § 136a(c)(1)(D)(ii). This sentence is obviously addressed to defaults by third-party "follow-on" applicants in the registration process and hardly suggests that Congress would have scrapped the entire data-use provision if the compensation component was found unconstitutional. To restate the obvious, Congress undoubtedly intended that EPA have use of original applicants' research data *and* that such use be recompensed—the statute, after all, provides for both. But the Legislature's unequivocal intention to facilitate pesticide registrations and the presence of an express severability provision (accompanied by the traditional duty "to save and not to destroy," *Tilton* v. *Richardson*, 403 U. S. 672, 684 (1971)), makes it rather unlikely that Congress gambled the entire pesticide registration process on the constitutionality of a provision for arbitrable compensation. I therefore conclude that even if we invalidated the compensation clauses appellees would have no right to an injunction against EPA's use of appellees' research data.

for interfering with the agency's use of appellees' data. See *ante*, at 584–585; *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1016–1019 (1984). Therefore, whether or not the arbitration provision is constitutional, there is no basis for enjoining EPA's use of appellees' research data.

For a party to have standing to invoke the jurisdiction of a federal court "relief from the injury must be 'likely' to follow from a favorable decision." *Allen* v. *Wright*, 468 U. S. 737, 751 (1984); accord, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 38, 43–46 (1976); *Warth* v. *Seldin*, 422 U. S. 490, 507 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 618–619 (1973). Because § 3(c)(1)(D)(ii) does not give appellees any legal basis for claiming that they have been harmed by anything EPA did or threatened to do, a decision that FIFRA's arbitration provisions violate Article III could not support an injunction against the Administrator's use of appellees' data. Accordingly, appellees do not have standing to challenge the constitutionality of § 3(c)(1)(D)(ii) in this action.[3] For this reason, I agree that the judgment of the District Court must be reversed.

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[3] The District Court held that appellees had standing to challenge FIFRA's arbitration provisions because "plaintiffs' injuries here would be the direct product of the statutory plan." *Union Carbide Agricultural Products Co.* v. *Ruckelshaus*, 571 F. Supp. 117, 123, n. 2 (SDNY 1983). This analysis is incomplete: "The injury must be 'fairly' traceable to the challenged action, *and* relief from the injury must be 'likely' to follow from a favorable decision." *Allen* v. *Wright*, 468 U. S., at 751 (emphasis added); accord, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S., at 472. These two components of the Article III causation requirement are distinct: The "fairly traceable" component "examines the causal connection between the assertedly unlawful conduct and the alleged injury"; the "redressability" component "examines the causal connection between the alleged injury and the judicial relief requested." *Allen* v. *Wright*, *supra*, at 753, n. 19. "[I]t is important to keep the inquiries separate." *Ibid.*

AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. *v.* HAROCO, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84–822. Argued April 17, 1985—Decided July 1, 1985

In respondents' private civil action brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961–1968, they alleged that petitioner bank and several of its officers had fraudulently charged excessive interest rates on loans to respondents, and that the scheme to defraud, which was carried on through the mails, violated § 1962(c), in that the mailings constituted a pattern of racketeering activity by means of which petitioners conducted, or participated in the conduct of, the bank. The only injuries alleged were the excessive interest charges themselves. The District Court dismissed on the ground that the complaint did not state a claim, but the Court of Appeals reversed in relevant part.

Held:

1. In their brief and at oral argument, petitioners raised the issue—not raised or addressed below and not included in the question presented by their petition for certiorari—that respondents' complaint did not adequately allege a violation of § 1962(c) because they had not shown that the enterprise was "conducted" through a pattern of racketeering activity. The issue will not be considered, in view of this Court's Rule 21.1(a) that only the question set forth in the petition for certiorari or fairly included therein will be considered.

2. There is no merit to petitioners' argument that respondents' injury must flow not from the predicate offenses, prescribed in the statute, but from the fact that they were performed as part of the conduct of an enterprise. That argument is a variation on the "racketeering injury" concept rejected in *Sedima, S. P. R. L.* v. *Imrex Co.*, *ante*, p. 479.

747 F. 2d 384, affirmed.

Donald E. Egan argued the cause for petitioners. With him on the briefs were *Michael Wm. Zavis*, *Francis X. Grossi, Jr.*, and *Lee Ann Watson*.

Aram A. Hartunian argued the cause for respondents. With him on the brief was *Joel Hellman*.*

**John J. Gill*, *Johanna M. Sabol*, *Michael F. Crotty*, and *Edward F. Mannino* filed a brief for the American Bankers Association as *amicus curiae* urging reversal.

PER CURIAM.

This is a private civil action brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U. S. C. §§ 1961–1968. Respondents' complaint alleged that petitioner bank and several of its officers had fraudulently charged excessive interest rates on loans. The gist of the claim was that the bank had lied with regard to its prime rate and that the rate charged to respondents, which was pegged to the prime, was therefore too high. The complaint alleged that this scheme to defraud, which was carried on through the mails, violated 18 U. S. C. § 1962(c), in that the mailings constituted a pattern of racketeering activity by means of which petitioners conducted, or participated in the conduct

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Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *Norman C. Gorsuch* of Alaska, *John Van de Kamp* of California, *Duane Woodard* of Colorado, *Joseph Lieberman* of Connecticut, *Joe Smith* of Florida, *Michael Lilly* of Hawaii, *Jim Jones* of Idaho, *Neil Hartigan* of Illinios, *Linley E. Pearson* of Indiana, *David L. Armstrong* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *Frank J. Kelley* of Michigan, *Edward L. Pittman* of Mississippi, *William L. Webster* of Missouri, *Mike Greely* of Montana, *Brian McKay* of Nevada, *Irwin L. Kimmelman* of New Jersey, *Paul Bardacke* of New Mexico, *Lacy H. Thornburg* of North Carolina, *Nicholas J. Spaeth* of North Dakota, *Anthony Celebrezze* of Ohio, *Michael Turpen* of Oklahoma, *David Frohnmayer* of Oregon, *Dennis J. Roberts II* of Rhode Island, *T. Travis Medlock* of South Carolina, *Mark V. Meierhenry* of South Dakota, *W. J. Michael Cody* of Tennessee, *David L. Wilkinson* of Utah, *John J. Easton* of Vermont, *Kenneth O. Eikenberry* of Washington, *Charlie Brown* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Archie G. McClintock* of Wyoming; for the State of New York by *Robert Abrams*, Attorney General, *Robert Hermann*, Solicitor General, and *R. Scott Greathead*, First Assistant Attorney General; for the City of Chicago et al. by *James D. Montgomery*, *Frederick A. O. Schwarz, Jr.*, *Barbara W. Mather*, and *Leonard Koerner;* for the County of Suffolk, New York, by *Mark D. Cohen;* for the Interinsurance Exchange of the Automobile Club of Southern California by *James M. Fischer* and *Patrick Mesisca, Jr.;* and for John Grado et al. by *James S. Dittmar.*

of, the bank. The only injuries alleged were the excessive interest charges themselves.

The District Court dismissed on the ground that the complaint did not state a claim. 577 F. Supp. 111 (ND Ill. 1983). In its view, "to be cognizable under RICO [the injury] must be caused by a RICO violation and not simply by the commission of predicate offenses, such as acts of mail fraud." *Id.*, at 114. The Court of Appeals for the Seventh Circuit reversed in relevant part, 747 F. 2d 384 (1984), rejecting various formulations of a requirement of a distinct RICO injury. We granted certiorari, 469 U. S. 1157 (1984), to consider the question whether a claim under § 1964(c) requires that the plaintiff have suffered damages by reason of the defendant's violation of § 1962 through the prescribed predicate offenses, or whether injury from those offenses alone is sufficient.*

In their brief, and at oral argument, petitioners have argued primarily that respondents' complaint does not adequately allege a violation of § 1962(c). In particular, they assert that respondents have not shown that the enterprise was "conducted" through a pattern of racketeering activity. Petitioners do not appear to have made this precise argument below, it was not addressed by the Court of Appeals, and it quite clearly is not included in the question presented by their petition for certiorari. Although we have the authority to waive it, this Court's Rule 21.1(a) provides that only the question set forth in the petition for certiorari or fairly included therein will be considered, and we therefore do not consider petitioners' late-blooming argument that the complaint failed to allege a violation of § 1962(c).

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*The question presented was:

"Whether a civil claim for treble damages under the Racketeer Influenced And Corrupt Organizations Act ('RICO') requires that the plaintiff suffer damages by reason of the defendant acquiring, maintaining control or an interest in, or conducting the affairs of an 'enterprise' through the commission of statutorily prescribed offenses as opposed to being damaged solely by reason of the defendant's commission of such offenses." Pet. for Cert. i.

To the extent petitioners' argument is a variation on the racketeering injury concept at issue in *Sedima, S. P. R. L.* v. *Imrex Co.*, *ante*, p. 479, it is inconsistent with that decision. The submission that the injury must flow not from the predicate acts themselves but from the fact that they were performed as part of the conduct of an enterprise suffers from the same defects as the amorphous and unfounded restrictions on the RICO private action we rejected in that case.

With regard to the question presented, we view the decision of the court below as consistent with today's opinion in *Sedima*, and it is accordingly

Affirmed.

[For dissenting opinion of JUSTICE MARSHALL, see *ante*, p. 500.]

OKLAHOMA *v.* ARKANSAS

ON BILL OF COMPLAINT

No. 79, Orig. Decree entered July 1, 1985

This cause came on this date for final adjudication upon the Report of Special Master, and the Court, being fully advised in the premises, finds that the Report of Special Master should be adopted and approved as submitted, and a final Decree entered accordingly.

DECREE

IT IS ORDERED, ADJUDGED, AND DECREED THAT:

1. The Report of Special Master is hereby adopted and approved in its entirety, as submitted.

2. This Decree determines the geographical location of the common boundary between the States of Oklahoma and Arkansas in a particular area bordered by Le Flore County, Oklahoma, and Sebastian County, Arkansas. More particularly, this Decree determines which State has sovereign control over a tract of land (the "disputed tract") which is shown by the "Original Field Notes of Township 8 and 9 North Range 32 West" of the original government surveyor, William Clarkson, Jr., dated December 28, 1828, and by the map of the United States Surveyor John Fisher prepared in 1904 to contain approximately 55 acres bounded on the east by the western boundary of the Territory of Arkansas in 1828 and the State of Arkansas in 1904, and bounded on the west by the Poteau and Arkansas Rivers.

3. The disputed tract was included in certain lands ceded by the United States to the Choctaw Indian Nation in 1820. In the "Treaty with the [Western] Cherokees, 1828," the western boundary of the Territory of Arkansas was defined as follows:

> "The Western boundary of Arkansas shall be, and the same is, hereby defined, viz: A line shall be run, com-

mencing on Red River, at the point where the Eastern Choctaw line strikes said River, and run due North with said line to the River Arkansas, thence in a direct line to the South West corner of Missouri." 7 Stat. 311 (May 6, 1828).

When the State of Arkansas was admitted to the Union in 1836, the Congress of the United States adopted the line described above in the Treaty of 1828 as the western boundary of the State of Arkansas. 5 Stat. 50 (June 15, 1836).

4. In 1905, the Congress of the United States gave the "consent of the United States" to the State of Arkansas to extend the western boundary of Arkansas to include the disputed tract by a Congressional Act which became a law of the United States, reading in part as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the consent of the United States is hereby given for the State of Arkansas to extend her western boundary line so as to include all that strip of land in the Indian Territory lying and being situate between the Arkansas State line adjacent to the city of Fort Smith, Arkansas, and the Arkansas and Poteau rivers, described as follows, namely: Beginning at a point on the south bank of the Arkansas River one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running southwesterly along the south bank of the Arkansas River to the mouth of the Poteau; thence at right angles with the Poteau River to the center of the current of said river; thence southerly up the middle of the current of the Poteau River (except where the Arkansas State line intersects the Poteau River) to a point in the middle of the current of the Poteau River opposite the mouth of Mill Creek, and where it is intersected by the middle of the current of Mill Creek; thence up the middle of Mill Creek to the Arkansas State line; thence northerly along

the Arkansas State line to the point of beginning . . . ." Act of February 10, 1905, 33 Stat. 714.

5. The Congress of the United States and the State of Arkansas had the power, acting together, to extend the western boundary of the State of Arkansas in 1905, without the consent of the Choctaw and Chickasaw Nations to the alteration of the eastern boundary of their lands. The Congress of the United States had the power to unilaterally consent to a change in the boundary of the Choctaw and Chickasaw lands and to transfer sovereign control over the disputed tract to the State of Arkansas. The Congress of the United States fully exercised this power in the Act of February 10, 1905, quoted in paragraph 4 above. On February 16, 1905, the State of Arkansas took appropriate legislative action to extend its western boundary as permitted by the consent of the United States in the portion of the Congressional Act quoted above in paragraph 4. Act No. 41, February 16, 1905 (now codified as Ark. Stat. Ann. § 5–101 (Repl. 1976)). Thus, the disputed tract became part of the State of Arkansas in 1905 by the joint action of the Congress of the United States and the State of Arkansas, and remains so to this day.

6. The parties stipulated that the State of Arkansas has exercised continuous sovereignty, dominion, control, and exclusive criminal and civil jurisdiction over the disputed tract since the enactment of Act No. 41 by the Arkansas Legislature on February 16, 1905; that Sebastian County, Arkansas, has continuously levied and collected real property taxes within the disputed tract; and that Le Flore County, Oklahoma, has never levied or collected taxes within the disputed tract. Pursuant to the holding in *California* v. *Nevada*, 447 U. S. 125 (1980), the doctrine of acquiescence applies to the boundary dispute between the State of Oklahoma and the State of Arkansas. Therefore, as a separate ground, the disputed tract has become and continues to be a part of the State of Arkansas under the doctrine of acquiescence.

7. The disputed tract of land is a part of the State of Arkansas.

8. Judgment be, and it is hereby, entered in favor of the State of Arkansas and against the State of Oklahoma, dismissing the claims of the State of Oklahoma with prejudice.

9. All costs are hereby taxed against the State of Oklahoma. All such costs have been paid by the State of Oklahoma.

The Special Master is hereby discharged.

MITSUBISHI MOTORS CORP. *v.* SOLER CHRYSLER-PLYMOUTH, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 83–1569. Argued March 18, 1985—Decided July 2, 1985*

Petitioner-cross-respondent (hereafter petitioner), a Japanese corporation that manufactures automobiles, is the product of a joint venture between Chrysler International, S. A. (CISA), a Swiss corporation, and another Japanese corporation, aimed at distributing through Chrysler dealers outside the continental United States automobiles manufactured by petitioner. Respondent-cross-petitioner (hereafter respondent), a Puerto Rico corporation, entered into distribution and sales agreements with CISA. The sales agreement (to which petitioner was also a party) contained a clause providing for arbitration by the Japan Commercial Arbitration Association of all disputes arising out of certain articles of the agreement or for the breach thereof. Thereafter, when attempts to work out disputes arising from a slackening of the sale of new automobiles failed, petitioner withheld shipment of automobiles to respondent, which disclaimed responsibility for them. Petitioner then brought an action in Federal District Court under the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, seeking an order to compel arbitration of the disputes in accordance with the arbitration clause. Respondent filed an answer and counterclaims, asserting, *inter alia*, causes of action under the Sherman Act and other statutes. The District Court ordered arbitration of most of the issues raised in the complaint and counterclaims, including the federal antitrust issues. Despite the doctrine of *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F. 2d 821 (CA2), uniformly followed by the Courts of Appeals, that rights conferred by the antitrust laws are inappropriate for enforcement by arbitration, the District Court, relying on *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, held that the international character of the undertaking in question required enforcement of the arbitration clause even as to the antitrust claims. The Court of Appeals reversed insofar as the District Court ordered submission of the antitrust claims to arbitration.

Held:

1. There is no merit to respondent's contention that because it falls within the class for whose benefit the statutes specified in the counter-

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*Together with No. 83–1733, *Soler Chrysler-Plymouth, Inc.* v. *Mitsubishi Motors Corp.*, also on certiorari to the same court.

claims were passed, but the arbitration clause at issue does not mention these statutes or statutes in general, the clause cannot be properly read to contemplate arbitration of these statutory claims. There is no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims. Nor is there any reason to depart from the federal policy favoring arbitration where a party bound by an arbitration agreement raises claims founded on statutory rights. Pp. 624–628.

2. Respondent's antitrust claims are arbitrable pursuant to the Arbitration Act. Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require enforcement of the arbitration clause in question, even assuming that a contrary result would be forthcoming in a domestic context. See *Scherk* v. *Alberto-Culver Co.*, *supra*. The strong presumption in favor of freely negotiated contractual choice-of-forum provisions is reinforced here by the federal policy in favor of arbitral dispute resolution, a policy that applies with special force in the field of international commerce. The mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted. So too, the potential complexity of antitrust matters does not suffice to ward off arbitration; nor does an arbitration panel pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes. And the importance of the private damages remedy in enforcing the regime of antitrust laws does not compel the conclusion that such remedy may not be sought outside an American court. Pp. 628–640.

723 F. 2d 155, affirmed in part, reversed in part, and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, and in which MARSHALL, J., joined except as to Part II, *post*, p. 640. POWELL, J., took no part in the decision of the cases.

Wayne A. Cross argued the cause for petitioner in No. 83–1569 and respondent in No. 83–1733. With him on the briefs were *Robert L. Sills*, *William I. Sussman*, *Samuel T. Cespedes*, and *Ana Matilde Nin*.

Benjamin Rodriguez-Ramon argued the cause for respondent in No. 83–1569 and petitioner in No. 83–1733. With him on the briefs was *Jerome Murray*.

Jerrold Joseph Ganzfried argued the cause for the United States as *amicus curiae* supporting respondent in No. 83–1569. With him on the brief were *Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Wallace, Carolyn F. Corwin, Robert B. Nicholson,* and *Marion L. Jetton.**

JUSTICE BLACKMUN delivered the opinion of the Court.

The principal question presented by these cases is the arbitrability, pursuant to the Federal Arbitration Act, 9 U. S. C. § 1 *et seq.*, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), [1970] 21 U. S. T. 2517, T. I. A. S. No. 6997, of claims arising under the Sherman Act, 15 U. S. C. § 1 *et seq.*, and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction.

I

Petitioner-cross-respondent Mitsubishi Motors Corporation (Mitsubishi) is a Japanese corporation which manufactures automobiles and has its principal place of business in Tokyo, Japan. Mitsubishi is the product of a joint venture between, on the one hand, Chrysler International, S. A. (CISA), a Swiss corporation registered in Geneva and wholly owned by Chrysler Corporation, and, on the other, Mitsubishi Heavy Industries, Inc., a Japanese corporation. The

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*Briefs of *amici curiae* urging reversal were filed for the American Arbitration Association by *Michael F. Hoellering, Joseph T. McLaughlin, Wayne D. Collins, Alfred Ferrer, Rosemary S. Page, Thomas Thacher, John R. Stevenson, Robert B. von Mehren, Gerald Aksen, Henry P. de Vries, Andreas F. Lowenfeld,* and *J. Stewart McClendon;* and for the National Automobile Dealers Association by *Jerry S. Cohen.*

Briefs of *amici curiae* were filed for the International Chamber of Commerce by *James S. Campbell* and *Andrew N. Vollmer;* and for the Commonwealth of Puerto Rico by *Hector Rivera Cruz,* Secretary of Justice of Puerto Rico, *E. Edward Bruce,* and *Oscar M. Garibaldi.*

aim of the joint venture was the distribution through Chrysler dealers outside the continental United States of vehicles manufactured by Mitsubishi and bearing Chrysler and Mitsubishi trademarks. Respondent-cross-petitioner Soler Chrysler-Plymouth, Inc. (Soler), is a Puerto Rico corporation with its principal place of business in Pueblo Viejo, Guaynabo, Puerto Rico.

On October 31, 1979, Soler entered into a Distributor Agreement with CISA which provided for the sale by Soler of Mitsubishi-manufactured vehicles within a designated area, including metropolitan San Juan. App. 18. On the same date, CISA, Soler, and Mitsubishi entered into a Sales Procedure Agreement (Sales Agreement) which, referring to the Distributor Agreement, provided for the direct sale of Mitsubishi products to Soler and governed the terms and conditions of such sales. *Id.*, at 42. Paragraph VI of the Sales Agreement, labeled "Arbitration of Certain Matters," provides:

> "All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I–B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Id.*, at 52–53.

Initially, Soler did a brisk business in Mitsubishi-manufactured vehicles. As a result of its strong performance, its minimum sales volume, specified by Mitsubishi and CISA, and agreed to by Soler, for the 1981 model year was substantially increased. *Id.*, at 179. In early 1981, however, the new-car market slackened. Soler ran into serious difficulties in meeting the expected sales volume, and by the spring of 1981 it felt itself compelled to request that Mitsubishi delay or cancel shipment of several orders. 1 Record 181, 183. About the same time, Soler attempted to arrange for the

transshipment of a quantity of its vehicles for sale in the continental United States and Latin America. Mitsubishi and CISA, however, refused permission for any such diversion, citing a variety of reasons,[1] and no vehicles were transshipped. Attempts to work out these difficulties failed. Mitsubishi eventually withheld shipment of 966 vehicles, apparently representing orders placed for May, June, and July 1981 production, responsibility for which Soler disclaimed in February 1982. App. 131.

The following month, Mitsubishi brought an action against Soler in the United States District Court for the District of Puerto Rico under the Federal Arbitration Act and the Convention.[2] Mitsubishi sought an order, pursuant to 9 U. S. C. §§4 and 201,[3] to compel arbitration in accord with

[1] The reasons advanced included concerns that such diversion would interfere with the Japanese trade policy of voluntarily limiting imports to the United States, App. 143, 177–178; that the Soler-ordered vehicles would be unsuitable for use in certain proposed destinations because of their manufacture, with use in Puerto Rico in mind, without heaters and defoggers, *id.*, at 182; that the vehicles would be unsuitable for use in Latin America because of the unavailability there of the unleaded, high-octane fuel they required, *id.*, at 177, 181–182; that adequate warranty service could not be ensured, *id.*, at 176, 182; and that diversion to the mainland would violate contractual obligations between CISA and Mitsubishi, *id.*, at 144, 183.

[2] The complaint alleged that Soler had failed to pay for 966 ordered vehicles; that it had failed to pay contractual "distress unit penalties," intended to reimburse Mitsubishi for storage costs and interest charges incurred because of Soler's failure to take shipment of ordered vehicles; that Soler's failure to fulfill warranty obligations threatened Mitsubishi's reputation and goodwill; that Soler had failed to obtain required financing; and that the Distributor and Sales Agreements had expired by their terms or, alternatively, that Soler had surrendered its rights under the Sales Agreement. *Id.*, at 11–14.

[3] Section 4 provides in pertinent part:

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for

¶ VI of the Sales Agreement. App. 15.[4] Shortly after filing the complaint, Mitsubishi filed a request for arbitration before the Japan Commercial Arbitration Association. *Id.*, at 70.

Soler denied the allegations and counterclaimed against both Mitsubishi and CISA. It alleged numerous breaches by Mitsubishi of the Sales Agreement,[5] raised a pair of defamation claims,[6] and asserted causes of action under the Sher-

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in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

Section 201 provides: "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter." Article II of the Convention, in turn, provides:

"1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

. . . . . .

"3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." 21 U. S. T., at 2519. Title 9 U. S. C. § 203 confers jurisdiction on the district courts of the United States over an action falling under the Convention.

[4] Mitsubishi also sought an order against threatened litigation. App. 15–16.

[5] The alleged breaches included wrongful refusal to ship ordered vehicles and necessary parts, failure to make payment for warranty work and authorized rebates, and bad faith in establishing minimum-sales volumes. *Id.*, at 97–101.

[6] The fourth counterclaim alleged that Mitsubishi had made statements that defamed Soler's good name and business reputation to a company with which Soler was then negotiating the sale of its plant and distributorship. *Id.*, at 96. The sixth counterclaim alleged that Mitsubishi had made a willfully false and malicious statement in an affidavit submitted in support of

man Act, 15 U. S. C. § 1 *et seq.*; the federal Automobile Dealers' Day in Court Act, 70 Stat. 1125, 15 U. S. C. § 1221 *et seq.*; the Puerto Rico competition statute, P. R. Laws Ann., Tit. 10, § 257 *et seq.* (1976); and the Puerto Rico Dealers' Contracts Act, P. R. Laws Ann., Tit. 10, § 278 *et seq.* (1976 and Supp. 1983). In the counterclaim premised on the Sherman Act, Soler alleged that Mitsubishi and CISA had conspired to divide markets in restraint of trade. To effectuate the plan, according to Soler, Mitsubishi had refused to permit Soler to resell to buyers in North, Central, or South America vehicles it had obligated itself to purchase from Mitsubishi; had refused to ship ordered vehicles or the parts, such as heaters and defoggers, that would be necessary to permit Soler to make its vehicles suitable for resale outside Puerto Rico; and had coercively attempted to replace Soler and its other Puerto Rico distributors with a wholly owned subsidiary which would serve as the exclusive Mitsubishi distributor in Puerto Rico. App. 91–96.

After a hearing, the District Court ordered Mitsubishi and Soler to arbitrate each of the issues raised in the complaint and in all the counterclaims save two and a portion of a third.[7] With regard to the federal antitrust issues, it recognized that the Courts of Appeals, following *American Safety Equip-*

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its application for a temporary restraining order, and that Mitsubishi had wrongfully advised Soler's customers and the public in its market area that they should no longer do business with Soler. *Id.*, at 98–99.

[7] The District Court found that the arbitration clause did not cover the fourth and sixth counterclaims, which sought damages for defamation, see n. 6, *supra*, or the allegations in the seventh counterclaim concerning discriminatory treatment and the establishment of minimum-sales volumes. App. to Pet. for Cert. in No. 83–1569, pp. B10–B11. Accordingly, it retained jurisdiction over those portions of the litigation. In addition, because no arbitration agreement between Soler and CISA existed, the court retained jurisdiction, insofar as they sought relief from CISA, over the first, second, third, and ninth counterclaims, which raised claims under the Puerto Rico Dealers' Contracts Act, the federal Automobile Dealers' Day in Court Act, the Sherman Act, and the Puerto Rico competition statute, respectively. *Id.*, at B12. These aspects of the District Court's ruling were not appealed and are not before this Court.

ment Corp. v. *J. P. Maguire & Co.*, 391 F. 2d 821 (CA2 1968), uniformly had held that the rights conferred by the antitrust laws were "'of a character inappropriate for enforcement by arbitration.'" App. to Pet. for Cert. in No. 83–1569, p. B9, quoting *Wilko* v. *Swan*, 201 F. 2d 439, 444 (CA2 1953), rev'd, 346 U. S. 427 (1953). The District Court held, however, that the international character of the Mitsubishi-Soler undertaking required enforcement of the agreement to arbitrate even as to the antitrust claims. It relied on *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 515–520 (1974), in which this Court ordered arbitration, pursuant to a provision embodied in an international agreement, of a claim arising under the Securities Exchange Act of 1934 notwithstanding its assumption, *arguendo*, that *Wilko*, *supra*, which held non-arbitrable claims arising under the Securities Act of 1933, also would bar arbitration of a 1934 Act claim arising in a domestic context.

The United States Court of Appeals for the First Circuit affirmed in part and reversed in part. 723 F. 2d 155 (1983). It first rejected Soler's argument that Puerto Rico law precluded enforcement of an agreement obligating a local dealer to arbitrate controversies outside Puerto Rico.[8] It also rejected Soler's suggestion that it could not have intended to arbitrate statutory claims not mentioned in the arbitration agreement. Assessing arbitrability "on an allegation-by-allegation basis," *id.*, at 159, the court then read the arbitra-

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[8] Soler relied on P. R. Laws Ann., Tit. 10, § 278b–2 (Supp. 1983), which purports to render null and void "[a]ny stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy that comes up regarding his dealer's contract outside of Puerto Rico, or under foreign law or rule of law." See *Walborg Corp.* v. *Superior Court*, 104 P. R. R. 258 (1975). The Court of Appeals held this provision pre-empted by 9 U. S. C. § 2, which declares arbitration agreements valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 723 F. 2d, at 158. See *Southland Corp.* v. *Keating*, 465 U. S. 1 (1984). See also *Ledee* v. *Ceramiche Ragno*, 684 F. 2d 184 (CA1 1982). Soler does not challenge this holding in its cross-petition here.

tion clause to encompass virtually all the claims arising under the various statutes, including all those arising under the Sherman Act.[9]

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[9] As the Court of Appeals saw it, "[t]he question . . . is not whether the arbitration clause mentions antitrust or any other particular cause of action, but whether the factual allegations underlying Soler's counterclaims—and Mitsubishi's bona fide defenses to those counterclaims—are within the scope of the arbitration clause, whatever the legal labels attached to those allegations." 723 F. 2d, at 159. Because Soler's counterclaim under the Puerto Rico Dealers' Contracts Act focused on Mitsubishi's alleged failure to comply with the provisions of the Sales Agreement governing delivery of automobiles, and those provisions were found in that portion of Article I of the Agreement subject to arbitration, the Court of Appeals placed this first counterclaim within the arbitration clause. *Id.*, at 159–160.

The court read the Sherman Act counterclaim to raise issues of wrongful termination of Soler's distributorship, wrongful failure to ship ordered parts and vehicles, and wrongful refusal to permit transshipment of stock to the United States and Latin America. Because the existence of just cause for termination turned on Mitsubishi's allegations that Soler had breached the Sales Agreement by, for example, failing to pay for ordered vehicles, the wrongful termination claim implicated at least three provisions within the arbitration clause: Article I–D(1), which rendered a dealer's orders "firm"; Article I–E, which provided for "distress unit penalties" where the dealer prevented timely shipment; and Article I–F, specifying payment obligations and procedures. The court therefore held the arbitration clause to cover this dispute. Because the nonshipment claim implicated Soler's obligation under Article I–F to proffer acceptable credit, the court found this dispute covered as well. And because the transshipment claim prompted Mitsubishi defenses concerning the suitability of vehicles manufactured to Soler's specifications for use in different locales and Soler's inability to provide warranty service to transshipped products, it implicated Soler's obligation under Article IV, another covered provision, to make use of Mitsubishi's trademarks in a manner that would not dilute Mitsubishi's reputation and goodwill or damage its name and reputation. The court therefore found the arbitration agreement also to include this dispute, noting that such trademark concerns "are relevant to the legality of territorially based restricted distribution arrangements of the sort at issue here." 723 F. 2d, at 160–161, citing *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977).

The Court of Appeals read the federal Automobile Dealers' Day in Court Act claim to raise issues as to Mitsubishi's good faith in establishing

Finally, after endorsing the doctrine of *American Safety*, precluding arbitration of antitrust claims, the Court of Appeals concluded that neither this Court's decision in *Scherk* nor the Convention required abandonment of that doctrine in the face of an international transaction. 723 F. 2d, at 164–168. Accordingly, it reversed the judgment of the District Court insofar as it had ordered submission of "Soler's antitrust claims" to arbitration.[10] Affirming the remainder of the judgment,[11] the court directed the District Court to consider in the first instance how the parallel judicial and arbitral proceedings should go forward.[12]

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minimum-sales volumes and Mitsubishi's alleged attempt to coerce Soler into accepting replacement by a Mitsubishi subsidiary. It agreed with the District Court's conclusion, in which Mitsubishi acquiesced, that the arbitration clause did not reach the first issue; it found the second, arising from Soler's payment problems, to restate claims already found to be covered. 723 F. 2d, at 161.

Finally, the Court of Appeals found the antitrust claims under Puerto Rico law entirely to reiterate claims elsewhere stated; accordingly, it held them arbitrable to the same extent as their counterparts. *Ibid.*

[10] Soler suggests that the court thereby declared antitrust claims arising under Puerto Rico law nonarbitrable as well. We read the Court of Appeals' opinion to have held only the federal antitrust claims nonarbitrable. See *id.*, at 157 ("principal issue on this appeal is whether arbitration of federal antitrust claims may be compelled under the Federal Arbitration Act"); *id.*, at 161 ("major question in this appeal is whether the antitrust issues raised by Soler's third counterclaim [grounded on Sherman Act] are subject to arbitration"). In any event, any contention that the local antitrust claims are nonarbitrable would be foreclosed by this Court's decision in *Southland Corp.* v. *Keating*, 465 U. S., at 10, where we held that the Federal Arbitration Act "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."

[11] In this Court, Soler suggests for the first time that Congress intended that claims under the federal Automobile Dealers' Day in Court Act be nonarbitrable. Brief for Respondent and Cross-Petitioner 21, n. 12. Because Soler did not raise this question in the Court of Appeals or present it in its cross-petition, we do not address it here.

[12] Following entry of the District Court's judgment, both it and the Court of Appeals denied motions by Soler for a stay pending appeal. The parties

We granted certiorari primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction. 469 U. S. 916 (1984).

II

At the outset, we address the contention raised in Soler's cross-petition that the arbitration clause at issue may not be read to encompass the statutory counterclaims stated in its answer to the complaint. In making this argument, Soler does not question the Court of Appeals' application of ¶ VI of the Sales Agreement to the disputes involved here as a matter of standard contract interpretation.[13] Instead, it argues

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accordingly commenced preparation for the arbitration in Japan. Upon remand from the Court of Appeals, however, Soler withdrew the antitrust claims from the arbitration tribunal and sought a stay of arbitration pending the completion of the judicial proceedings on the ground that the antitrust claims permeated the claims that remained before that tribunal. The District Court denied the motion, instead staying its own proceedings pending the arbitration in Japan. The arbitration recommenced, but apparently came to a halt once again in September 1984 upon the filing by Soler of a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U. S. C. § 1101 *et seq.*

[13] We therefore have no reason to review the Court of Appeals' construction of the scope of the arbitration clause in the light of the allegations of Soler's counterclaims. See n. 9, *supra; Southland Corp.* v. *Keating*, 465 U. S., at 15, n. 7.

Soler does suggest that, because the title of the clause referred only to "certain matters," App. 52, and the clause itself specifically referred only to "Articles I–B through V," *ibid.*, it should be read narrowly to exclude the statutory claims. Soler ignores the inclusion within those "certain matters" of "[a]ll disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to [the specified provisions] or for the breach thereof." Contrary to Soler's suggestion, the exclusion of some areas of possible dispute from the scope of an arbitration clause does not serve to restrict the reach of an otherwise broad clause in the areas in which it was intended to operate. Thus, insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability. See 723 F. 2d, at 159.

that as a matter of law a court may not construe an arbitration agreement to encompass claims arising out of statutes designed to protect a class to which the party resisting arbitration belongs "unless [that party] has expressly agreed" to arbitrate those claims, see Pet. for Cert. in No. 83–1733, pp. 8, i, by which Soler presumably means that the arbitration clause must specifically mention the statute giving rise to the claims that a party to the clause seeks to arbitrate. See 723 F. 2d, at 159. Soler reasons that, because it falls within the class for whose benefit the federal and local antitrust laws and dealers' Acts were passed, but the arbitration clause at issue does not mention these statutes or statutes in general, the clause cannot be read to contemplate arbitration of these statutory claims.

We do not agree, for we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims. The Act's centerpiece provision makes a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2. The "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 24 (1983), manifested by this provision and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." *Id.*, at 25, n. 32.[14] As this Court recently observed, "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,"

[14] The Court previously has explained that the Act was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law. See *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 219–221, and n. 6 (1985); *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 510, and n. 4 (1974).

a concern which "requires that we rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 221 (1985).

Accordingly, the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital*, 460 U. S., at 24. See *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 400–404 (1967); *Southland Corp.* v. *Keating*, 465 U. S. 1, 12 (1984). And that body of law counsels

> "that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital*, 460 U. S., at 24–25.

See, *e. g.*, *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582–583 (1960). Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.

There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights. Some time ago this Court expressed "hope for [the Act's] usefulness both in controversies based on statutes or on standards otherwise created," *Wilko* v. *Swan*, 346 U. S. 427, 432 (1953) (footnote omitted); see *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U. S. 117, 135, n. 15 (1973), and we are well past the time

when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution. Just last Term in *Southland Corp., supra,* where we held that § 2 of the Act declared a national policy applicable equally in state as well as federal courts, we construed an arbitration clause to encompass the disputes at issue without pausing at the source in a state statute of the rights asserted by the parties resisting arbitration. 465 U. S., at 15, and n. 7.[15] Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds "for the revocation of any contract." 9 U. S. C. § 2; see *Southland Corp.*, 465 U. S., at 16, n. 11; *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, 15 (1972). But, absent such compelling considerations, the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.

That is not to say that all controversies implicating statutory rights are suitable for arbitration. There is no reason to distort the process of contract interpretation, however, in order to ferret out the inappropriate. Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

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[15] The claims whose arbitrability was at issue in *Southland Corp.* arose under the disclosure requirements of the California Franchise Investment Law, Cal. Corp. Code Ann. § 31000 *et seq.* (West 1977). While the dissent in *Southland Corp.* disputed the applicability of the Act to proceedings in the state courts, it did not object to the Court's reading of the arbitration clause under examination.

See *Wilko* v. *Swan*, 346 U. S., at 434–435; *Southland Corp.*, 465 U. S., at 16, n. 11; *Dean Witter Reynolds Inc.*, 470 U. S., at 224–225 (concurring opinion). For that reason, Soler's concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read. By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. See *Wilko* v. *Swan*, *supra*. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate. See *Prima Paint Corp.*, 388 U. S., at 406.

In sum, the Court of Appeals correctly conducted a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims. We endorse its rejection of Soler's proposed rule of arbitration-clause construction.

III

We now turn to consider whether Soler's antitrust claims are nonarbitrable even though it has agreed to arbitrate them. In holding that they are not, the Court of Appeals followed the decision of the Second Circuit in *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F. 2d 821 (1968). Notwithstanding the absence of any explicit support

for such an exception in either the Sherman Act or the Federal Arbitration Act, the Second Circuit there reasoned that "the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration." *Id.*, at 827–828. We find it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions. As in *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506 (1974), we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Even before *Scherk*, this Court had recognized the utility of forum-selection clauses in international transactions. In *The Bremen*, *supra*, an American oil company, seeking to evade a contractual choice of an English forum and, by implication, English law, filed a suit in admiralty in a United States District Court against the German corporation which had contracted to tow its rig to a location in the Adriatic Sea. Notwithstanding the possibility that the English court would enforce provisions in the towage contract exculpating the German party which an American court would refuse to enforce, this Court gave effect to the choice-of-forum clause. It observed:

> "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." 407 U. S., at 9.

Recognizing that "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting," *id.*, at 13–14, the decision in *The Bremen* clearly eschewed a provincial solicitude for the jurisdiction of domestic forums.

Identical considerations governed the Court's decision in *Scherk*, which categorized "[a]n agreement to arbitrate before a specified tribunal [as], in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." 417 U. S., at 519. In *Scherk*, the American company Alberto-Culver purchased several interrelated business enterprises, organized under the laws of Germany and Liechtenstein, as well as the rights held by those enterprises in certain trademarks, from a German citizen who at the time of trial resided in Switzerland. Although the contract of sale contained a clause providing for arbitration before the International Chamber of Commerce in Paris of "any controversy or claim [arising] out of this agreement or the breach thereof," Alberto-Culver subsequently brought suit against Scherk in a Federal District Court in Illinois, alleging that Scherk had violated § 10(b) of the Securities Exchange Act of 1934 by fraudulently misrepresenting the status of the trademarks as unencumbered. The District Court denied a motion to stay the proceedings before it and enjoined the parties from going forward before the arbitral tribunal in Paris. The Court of Appeals for the Seventh Circuit affirmed, relying on this Court's holding in *Wilko* v. *Swan*, 346 U. S. 427 (1953), that agreements to arbitrate disputes arising under the Securities Act of 1933 are nonarbitrable. This Court reversed, enforcing the arbitration agreement even while assuming for purposes of the decision that the controversy would be nonarbitrable under the holding of *Wilko* had it arisen out of a domestic transaction. Again, the Court emphasized:

> "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. . . .
>
> "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." 417 U. S., at 516–517.

Accordingly, the Court held Alberto-Culver to its bargain, sending it to the international arbitral tribunal before which it had agreed to seek its remedies.

The Bremen and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. Here, as in *Scherk*, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution. And at least since this Nation's accession in 1970 to the Convention, see [1970] 21 U. S. T. 2517, T. I. A. S. 6997, and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act,[16] that federal policy applies with special force in the field of international commerce. Thus, we must weigh the concerns of *American Safety* against a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes and an equal commitment to the enforcement of freely negotiated choice-of-forum clauses.

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[16] Act of July 31, 1970, Pub. L. 91–368, 84 Stat. 692, codified at 9 U. S. C. §§ 201–208.

At the outset, we confess to some skepticism of certain aspects of the *American Safety* doctrine. As distilled by the First Circuit, 723 F. 2d, at 162, the doctrine comprises four ingredients. First, private parties play a pivotal role in aiding governmental enforcement of the antitrust laws by means of the private action for treble damages. Second, "the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract." Third, antitrust issues, prone to complication, require sophisticated legal and economic analysis, and thus are "ill-adapted to strengths of the arbitral process, *i. e.*, expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity." Finally, just as "issues of war and peace are too important to be vested in the generals, . . . decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community—particularly those from a foreign community that has had no experience with or exposure to our law and values." See *American Safety*, 391 F. 2d, at 826–827.

Initially, we find the second concern unjustified. The mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted. A party resisting arbitration of course may attack directly the validity of the agreement to arbitrate. See *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967). Moreover, the party may attempt to make a showing that would warrant setting aside the forum-selection clause—that the agreement was "[a]ffected by fraud, undue influence, or overweening bargaining power"; that "enforcement would be unreasonable and unjust"; or that proceedings "in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court." *The Bremen*, 407 U. S., at

12, 15, 18. But absent such a showing—and none was attempted here—there is no basis for assuming the forum inadequate or its selection unfair.

Next, potential complexity should not suffice to ward off arbitration. We might well have some doubt that even the courts following *American Safety* subscribe fully to the view that antitrust matters are inherently insusceptible to resolution by arbitration, as these same courts have agreed that an undertaking to arbitrate antitrust claims entered into *after* the dispute arises is acceptable. See, *e. g.*, *Coenen* v. *R. W. Pressprich & Co.*, 453 F. 2d 1209, 1215 (CA2), cert. denied, 406 U. S. 949 (1972); *Cobb* v. *Lewis*, 488 F. 2d 41, 48 (CA5 1974). See also, in the present cases, 723 F. 2d, at 168, n. 12 (leaving question open). And the vertical restraints which most frequently give birth to antitrust claims covered by an arbitration agreement will not often occasion the monstrous proceedings that have given antitrust litigation an image of intractability. In any event, adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal.[17] Moreover, it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies. In sum, the factor of potential com-

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[17] See, *e. g.*, Japan Commercial Arbitration Association Rule 26, reprinted in App. 218–219; L. Craig, W. Park, & J. Paulsson, International Chamber of Commerce Arbitration §§ 25.03, 26.04 (1984); Art. 27, Arbitration Rules of United Nations Commission on International Trade Law (UNCITRAL) (1976), reprinted in 2 Yearbook Commercial Arbitration 167 (1977).

plexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter.

For similar reasons, we also reject the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes. International arbitrators frequently are drawn from the legal as well as the business community; where the dispute has an important legal component, the parties and the arbitral body with whose assistance they have agreed to settle their dispute can be expected to select arbitrators accordingly.[18] We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.

We are left, then, with the core of the *American Safety* doctrine—the fundamental importance to American democratic capitalism of the regime of the antitrust laws. See,

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[18] See Craig, Park, & Paulsson, *supra*, § 12.03, p. 28; Sanders, Commentary on UNCITRAL Arbitration Rules § 15.1, in 2 Yearbook Commercial Arbitration, *supra*, at 203.

We are advised by Mitsubishi and *amicus* International Chamber of Commerce, without contradiction by Soler, that the arbitration panel selected to hear the parties' claims here is composed of three Japanese lawyers, one a former law school dean, another a former judge, and the third a practicing attorney with American legal training who has written on Japanese antitrust law. Brief for Petitioner in No. 83–1569, p. 26; Brief for International Chamber of Commerce as *Amicus Curiae* 16, n. 28.

The Court of Appeals was concerned that international arbitrators would lack "experience with or exposure to our law and values." 723 F. 2d, at 162. The obstacles confronted by the arbitration panel in this case, however, should be no greater than those confronted by any judicial or arbitral tribunal required to determine foreign law. See, *e. g.*, Fed. Rule Civ. Proc. 44.1. Moreover, while our attachment to the antitrust laws may be stronger than most, many other countries, including Japan, have similar bodies of competition law. See, *e. g.*, 1 Law of Transnational Business Transactions, ch. 9 (Banks, Antitrust Aspects of International Business Operations), § 9.03[7] (V. Nanda ed. 1984); H. Iyori & A. Uesugi, The Antimonopoly Laws of Japan (1983).

e. g., *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972); *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 4 (1958). Without doubt, the private cause of action plays a central role in enforcing this regime. See, *e. g.*, *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 262 (1972). As the Court of Appeals pointed out:

> "'A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.'" 723 F. 2d, at 168, quoting *American Safety*, 391 F. 2d, at 826.

The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators. See, *e. g.*, *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 138–139 (1968).

The importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court. Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by § 4 of the Clayton Act, 15 U. S. C. § 15, and pursued by Soler here by way of its third counterclaim, seeks primarily to enable an injured competitor to gain compensation for that injury.

> "Section 4 . . . is in essence a remedial provision. It provides treble damages to '[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . .' Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. . . . It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a

multiple of the injury actually proved, is designed primarily as a remedy." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 485–486 (1977).

After examining the respective legislative histories, the Court in *Brunswick* recognized that when first enacted in 1890 as § 7 of the Sherman Act, 26 Stat. 210, the treble-damages provision "was conceived of primarily as a remedy for '[t]he people of the United States as individuals,'" 429 U. S., at 486, n. 10, quoting 21 Cong. Rec. 1767–1768 (1890) (remarks of Sen. George); when reenacted in 1914 as § 4 of the Clayton Act, 38 Stat. 731, it was still "conceived primarily as 'open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered.'" 429 U. S., at 486, n. 10, quoting 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb). And, of course, the antitrust cause of action remains at all times under the control of the individual litigant: no citizen is under an obligation to bring an antitrust suit, see *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 746 (1977), and the private antitrust plaintiff needs no executive or judicial approval before settling one. It follows that, at least where the international cast of a transaction would otherwise add an element of uncertainty to dispute resolution, the prospective litigant may provide in advance for a mutually agreeable procedure whereby he would seek his antitrust recovery as well as settle other controversies.

There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal there-

fore should be bound to decide that dispute in accord with the national law giving rise to the claim. Cf. *Wilko* v. *Swan*, 346 U. S., at 433–434.[19] And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.

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[19] In addition to the clause providing for arbitration before the Japan Commercial Arbitration Association, the Sales Agreement includes a choice-of-law clause which reads: "This Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein." App. 56. The United States raises the possibility that the arbitral panel will read this provision not simply to govern interpretation of the contract terms, but wholly to displace American law even where it otherwise would apply. Brief for United States as *Amicus Curiae* 20. The International Chamber of Commerce opines that it is "[c]onceivabl[e], although we believe it unlikely, [that] the arbitrators could consider Soler's affirmative claim of anticompetitive conduct by CISA and Mitsubishi to fall within the purview of this choice-of-law provision, with the result that it would be decided under Swiss law rather than the U. S. Sherman Act." Brief for International Chamber of Commerce as *Amicus Curiae* 25. At oral argument, however, counsel for Mitsubishi conceded that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis. Tr. of Oral. Arg. 18. The record confirms that before the decision of the Court of Appeals the arbitral panel had taken these claims under submission. See District Court Order of May 25, 1984, pp. 2–3.

We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court. We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy. See, *e. g.*, *Redel's Inc.* v. *General Electric Co.*, 498 F. 2d 95, 98–99 (CA5 1974); *Gaines* v. *Carrollton Tobacco Board of Trade, Inc.*, 386 F. 2d 757, 759 (CA6 1967); *Fox Midwest Theatres* v. *Means*, 221 F. 2d 173, 180 (CA8 1955). Cf. *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 329 (1955). See generally 15 S. Williston, Contracts § 1750A (3d ed. 1972).

Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." Art. V(2)(b), 21 U. S. T., at 2520; see *Scherk*, 417 U. S., at 519, n. 14. While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.[20]

As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978, 985 (CA2 1942), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at

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[20] See n. 19, *supra*. We note, for example, that the rules of the Japan Commercial Arbitration Association provide for the taking of a "summary record" of each hearing, Rule 28.1; for the stenographic recording of the proceedings where the tribunal so orders or a party requests one, Rule 28.2; and for a statement of reasons for the award unless the parties agree otherwise, Rule 36.1(4). See App. 219 and 221.

Needless to say, we intimate no views on the merits of Soler's antitrust claims.

least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration. See *Scherk*, *supra*.[21]

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[21] We do not quarrel with the Court of Appeals' conclusion that Art. II(1) of the Convention, which requires the recognition of agreements to arbitrate that involve "subject matter capable of settlement by arbitration," contemplates exceptions to arbitrability grounded in domestic law. See 723 F. 2d, at 164–166; G. Gaja, International Commercial Arbitration: New York Convention I. B.2 (1984); A. van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 152–154 (1981); Contini, International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 8 Am. J. Comp. L. 283, 296 (1959). But see Van den Berg, *supra*, at 154, and n. 98 (collecting contrary authorities); Gaja, *supra*, at I. D., n. 43 (same). And it appears that before acceding to the Convention the Senate was advised by a State Department memorandum that the Convention provided for such exceptions. See S. Exec. Doc. E, 90th Cong., 2d Sess., 19 (1968).

In acceding to the Convention the Senate restricted its applicability to commercial matters, in accord with Art. I(3). See 21 U. S. T., at 2519, 2560. Yet in implementing the Convention by amendment to the Federal Arbitration Act, Congress did not specify any matters it intended to exclude from its scope. See Act of July 31, 1970, Pub. L. 91–368, 84 Stat. 692, codified at 9 U. S. C. §§ 201–208. In *Scherk*, this Court recited Art. II(1), including the language relied upon by the Court of Appeals, but paid heed to the Convention delegates' "frequent[ly voiced] concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." 417 U. S., at 520, n. 15, citing G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958, pp. 24–28 (1958). There, moreover, the Court dealt, *arguendo*, with an exception to arbitrability grounded in express congressional language; here, in contrast, we face a judicially implied exception. The utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own. Doubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention. But we decline to subvert the

Accordingly, we "require this representative of the American business community to honor its bargain," *Alberto-Culver Co.* v. *Scherk*, 484 F. 2d 611, 620 (CA7 1973) (Stevens, J., dissenting), by holding this agreement to arbitrate "enforce[able] . . . in accord with the explicit provisions of the Arbitration Act." *Scherk*, 417 U. S., at 520.

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the decision of these cases.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, and with whom JUSTICE MARSHALL joins except as to Part II, dissenting.

One element of this rather complex litigation is a claim asserted by an American dealer in Plymouth automobiles that two major automobile companies are parties to an international cartel that has restrained competition in the American market. Pursuant to an agreement that is alleged to have violated § 1 of the Sherman Act, 15 U. S. C. § 1, those companies allegedly prevented the dealer from transshipping some 966 surplus vehicles from Puerto Rico to other dealers in the American market. App. 92.

Petitioner denies the truth of the dealer's allegations and takes the position that the validity of the antitrust claim must be resolved by an arbitration tribunal in Tokyo, Japan. Largely because the auto manufacturers' defense to the antitrust allegation is based on provisions in the dealer's franchise agreement, the Court of Appeals concluded that the arbitration clause in that agreement encompassed the antitrust

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spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so.

claim. 723 F. 2d 155, 159 (CA1 1983). It held, however, as a matter of law, that arbitration of such a claim may not be compelled under either the Federal Arbitration Act[1] or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[2] *Id.*, at 161–168.

This Court agrees with the Court of Appeals' interpretation of the scope of the arbitration clause, but disagrees with its conclusion that the clause is unenforceable insofar as it purports to cover an antitrust claim against a Japanese company. This Court's holding rests almost exclusively on the federal policy favoring arbitration of commercial disputes and vague notions of international comity arising from the fact that the automobiles involved here were manufactured in Japan. Because I am convinced that the Court of Appeals' construction of the arbitration clause is erroneous, and because I strongly disagree with this Court's interpretation of the relevant federal statutes, I respectfully dissent. In my opinion, (1) a fair construction of the language in the arbitration clause in the parties' contract does not encompass a claim that auto manufacturers entered into a conspiracy in violation of the antitrust laws; (2) an arbitration clause should not normally be construed to cover a statutory remedy that it does not expressly identify; (3) Congress did not intend § 2 of the Federal Arbitration Act to apply to antitrust claims; and (4) Congress did not intend the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to apply to disputes that are not covered by the Federal Arbitration Act.

I

On October 31, 1979, respondent, Soler Chrysler-Plymouth, Inc. (Soler), entered into a "distributor agreement" to govern the sale of Plymouth passenger cars to be manufactured by petitioner, Mitsubishi Motors Corpora-

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[1] 9 U. S. C. §§ 4, 201.

[2] [1970] 21 U. S. T. 2517, T. I. A. S. No. 6997.

tion of Tokyo, Japan (Mitsubishi).[3] Mitsubishi, however, was not a party to that agreement. Rather the "purchase rights" were granted to Soler by a wholly owned subsidiary of Chrysler Corporation that is referred to as "Chrysler" in the agreement.[4] The distributor agreement does not contain an arbitration clause. Nor does the record contain any other agreement providing for the arbitration of disputes between Soler and Chrysler.

Paragraph 26 of the distributor agreement authorizes Chrysler to have Soler's orders filled by any company affiliated with Chrysler, that company thereby becoming the "supplier" of the products covered by the agreement with Chrysler.[5] Relying on paragraph 26 of their distributor

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[3] The distributor agreement provides, in part:

"This Agreement is made by and between CHRYSLER INTERNATIONAL S. A., a corporation organized and existing under the laws of the Swiss Confederation with its principal office in Geneva, Switzerland (hereinafter sometimes called CHRYSLER), and SOLER CHRYSLER-PLYMOUTH INC., . . . (hereinafter sometimes called DISTRIBUTOR), and will govern the sale by CHRYSLER to DISTRIBUTOR of PLYMOUTH PASSENGER CARS AND CAR DERIVATIVES MANUFACTURED BY MITSUBISHI MOTORS CORPORATION OF TOKYO, JAPAN and automotive replacement parts and accessories (said motor vehicles, replacement parts and accessories hereinafter sometimes called Products)." App. 18.

[4] "PURCHASE RIGHTS

"Subject to the provisions of this Agreement, CHRYSLER grants to DISTRIBUTOR the non-exclusive right to purchase Products from CHRYSLER, and DISTRIBUTOR agrees to buy Products from CHRYSLER, for resale within the following described territory (hereinafter called Sales Area): METROPOLITAN SAN JUAN, PUERTO RICO . . . ." *Ibid.*

This is the same company that is referred to as "CISA" in the sales purchase agreement and in the Court's opinion.

[5] Paragraph 26 of the distributor agreement provides:

"DIRECT SALES

"CHRYSLER and DISTRIBUTOR agree that CHRYSLER may, at its option, forward orders received from DISTRIBUTOR pursuant to this Agreement to its parent company, Chrysler Corporation, or to any subsid-

agreement,[6] Soler, Chrysler, and Mitsubishi entered into a separate Sales Procedure Agreement designating Mitsubishi as the supplier of the products covered by the distributor agreement.[7] The arbitration clause the Court construes today is found in that agreement.[8] As a matter of ordinary contract interpretation, there are at least two reasons why that clause does not apply to Soler's antitrust claim against Chrysler and Mitsubishi.

First, the clause only applies to two-party disputes between Soler and Mitsubishi. The antitrust violation alleged in Soler's counterclaim is a three-party dispute. Soler has joined both Chrysler and its associated company, Mitsubishi, as counterdefendants. The pleading expressly alleges that

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iary, associated or affiliated company (hereinafter called 'SUPPLIER') which will then sell the Products covered by such order directly to DISTRIBUTOR, CHRYSLER and DISTRIBUTOR hereby acknowledge and agree that, unless otherwise agreed in writing, any such direct sales between SUPPLIER and DISTRIBUTOR will be governed by the terms and conditions contained on the order form and in this Agreement and that any such sales will not constitute the basis forming a distributor relationship between SUPPLIER and DISTRIBUTOR. Further, DISTRIBUTOR acknowledges and agrees that any claim or controversy resulting from such direct sales by SUPPLIER will be handled by CHRYSLER as though such sale had been made by CHRYSLER." *Id.*, at 39–40.

[6] "WHEREAS, pursuant to Article 26 of the Distributor Agreement, CISA may forward orders received from BUYER to an associated company;

"WHEREAS, MMC and CISA have agreed that MMC, which is an associated company of CISA, may sell such MMC Products directly to BUYER pursuant to Article 26 of the Distributor Agreement." *Id.*, at 43.

[7] Mitsubishi is jointly owned by Chrysler and by Mitsubishi Heavy Industries, Ltd., a Japanese corporation. *Id.*, at 200–201.

[8] That clause reads as follows:

"ARBITRATION OF CERTAIN MATTERS

"All disputes, controversies or differences which may arise between MMC and BUYER out of or in relation to Articles I–B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Id.*, at 52–53.

both of those companies are "engaged in an unlawful combination and conspiracy to restrain and divide markets in interstate and foreign commerce, in violation of the Sherman Antitrust Act and the Clayton Act." App. 91. It is further alleged that Chrysler authorized and participated in several overt acts directed at Soler. At this stage of the case we must, of course, assume the truth of those allegations. Only by stretching the language of the arbitration clause far beyond its ordinary meaning could one possibly conclude that it encompasses this three-party dispute.

Second, the clause only applies to disputes "which may arise between MMC and BUYER out of or in relation to Articles I–B through V of this Agreement or for the breach thereof . . . ." *Id.*, at 52. Thus, disputes relating to only 5 out of a total of 15 Articles in the Sales Procedure Agreement are arbitrable. Those five Articles cover: (1) the terms and conditions of direct sales (matters such as the scheduling of orders, deliveries, and payment); (2) technical and engineering changes; (3) compliance by Mitsubishi with customs laws and regulations, and Soler's obligation to inform Mitsubishi of relevant local laws; (4) trademarks and patent rights; and (5) Mitsubishi's right to cease production of any products. It is immediately obvious that Soler's antitrust claim did not arise out of Articles I–B through V and it is not a claim "for the breach thereof." The question is whether it is a dispute "in relation to" those Articles.

Because Mitsubishi relies on those Articles of the contract to explain some of the activities that Soler challenges in its antitrust claim, the Court of Appeals concluded that the relationship between the dispute and those Articles brought the arbitration clause into play. I find that construction of the clause wholly unpersuasive. The words "in relation to" appear between the references to claims that arise under the contract and claims for breach of the contract; I believe all three of the species of arbitrable claims must be predicated on contractual rights defined in Articles I–B through V.

The federal policy favoring arbitration cannot sustain the weight that the Court assigns to it. A clause requiring arbitration of all claims "relating to" a contract surely could not encompass a claim that the arbitration clause was itself part of a contract in restraint of trade. Cf. *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930); see also *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 176 (1948). Nor in my judgment should it be read to encompass a claim that relies, not on a failure to perform the contract, but on an independent violation of federal law. The matters asserted by way of defense do not control the character, or the source, of the claim that Soler has asserted.[9] Accordingly, simply as a matter of ordinary contract interpretation, I would hold that Soler's antitrust claim is not arbitrable.

II

Section 2 of the Federal Arbitration Act describes three kinds of arbitrable agreements.[10] Two—those including maritime transactions and those covering the submission of an existing dispute to arbitration—are not involved in this case. The language of § 2 relating to the Soler-Mitsubishi arbitration clause reads as follows:

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[9] Even if Mitsubishi can prove that it did not violate any provision of the contract, such proof would not necessarily constitute a defense to the antitrust claim. In contrast, in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967), Prima Paint's claim of fraud in the inducement was asserted to rescind the contract, not as an independent basis of recovery.

[10] Section 2 provides:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2.

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The plain language of this statute encompasses Soler's claims that arise out of its contract with Mitsubishi, but does not encompass a claim arising under federal law, or indeed one that arises under its distributor agreement with Chrysler. Nothing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims.[11]

Until today all of our cases enforcing agreements to arbitrate under the Arbitration Act have involved contract claims. In one, the party claiming a breach of contractual warranties also claimed that the breach amounted to fraud actionable under § 10(b) of the Securities Exchange Act of 1934. *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506 (1974).[12]

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[11] In his dissent in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S., at 415, Justice Black quoted the following commentary written shortly after the statute was passed:

"Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned." Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 281 (1926).

In the *Prima Paint* case the Court held that the Act applied to a claim of fraud in the inducement of the contract, but did not intimate that it might also cover federal statutory claims. See n. 9, *supra*.

[12] "The dispute between these parties over the alleged shortage in defendant's inventory of European trademarks, a matter covered by contract

But this is the first time the Court has considered the question whether a standard arbitration clause referring to claims arising out of or relating to a contract should be construed to cover statutory claims that have only an indirect relationship to the contract.[13] In my opinion, neither the Congress that enacted the Arbitration Act in 1925, nor the many parties who have agreed to such standard clauses, could have anticipated the Court's answer to that question.

On several occasions we have drawn a distinction between statutory rights and contractual rights and refused to hold that an arbitration barred the assertion of a statutory right. Thus, in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), we held that the arbitration of a claim of employment discrimination would not bar an employee's statutory right to damages under Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e—2000e–17, notwithstanding the strong federal policy favoring the arbitration of labor disputes. In that case the Court explained at some length why it would be unreasonable to assume that Congress intended to give arbitrators the final authority to implement the federal statutory policy:

> "[W]e have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.' *U. S. Bulk Carriers* v. *Arguelles*, 400

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warranties and subject to pre-closing verification, is the kind of commercial dispute for which arbitration is entirely appropriate. In my opinion, the fact that the 'fraud' language of Rule 10(b)(5) has been included in the complaint is far less significant than the desirability of having the Court of Arbitration of the International Chamber of Commerce in Paris, France, decide the various questions of foreign law which should determine the rights of these parties." *Alberto-Culver Co.* v. *Scherk*, 484 F. 2d 611, 619–620 (CA7 1973) (Stevens, J., dissenting), rev'd, 417 U. S. 506 (1974).

[13] It is interesting to note that in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1 (1983), the Court referred to the standard clause describing claims "arising out of, or relating to, this Contract or the breach thereof" as a provision "for resolving disputes arising out of the contract or its breach." *Id.*, at 4–5.

U. S. 351, 359–360 (1971) (Harlan, J., concurring). Respondent's deferral rule is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely.

"Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. . . . But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581–583 (1960). Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." 415 U. S., at 56–57 (footnote omitted).

In addition, the Court noted that the informal procedures which make arbitration so desirable in the context of contractual disputes are inadequate to develop a record for appellate review of statutory questions.[14] Such review is essential on

[14] "Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and

matters of statutory interpretation in order to assure consistent application of important public rights.

In *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728 (1981), we reached a similar conclusion with respect to the arbitrability of an employee's claim based on the Fair Labor Standards Act, 29 U. S. C. §§ 201–219. We again noted that an arbitrator, unlike a federal judge, has no institutional obligation to enforce federal legislative policy:

> "Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights.
>
> "Finally, not only are arbitral procedures less protective of individual statutory rights than are judicial procedures, see *Gardner-Denver*, *supra*, at 57–58, but arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief. Under the FLSA, courts can award actual and liquidated damages, reasonable attorney's fees, and costs. 29 U. S. C. § 216(b). An arbitrator, by contrast, can award only that compensation authorized by the wage provision of the collective-bargaining agreement. . . . It is most unlikely that he will be authorized to award liquidated damages, costs, or attorney's fees." 450 U. S., at 744–745 (footnote omitted).

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procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. See *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 203 (1956); *Wilko* v. *Swan*, 346 U. S., at 435–437. And as this Court has recognized, '[a]rbitrators have no obligation to the court to give their reasons for an award.' *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S., at 598. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts." 415 U. S., at 57–58 (footnote omitted).

The Court has applied the same logic in holding that federal claims asserted under the Ku Klux Act of 1871, 42 U. S. C. § 1983, and claims arising under § 12(2) of the Securities Act of 1933, 15 U. S. C. § 77*l*(2), may not be finally resolved by an arbitrator. *McDonald* v. *City of West Branch*, 466 U. S. 284 (1984); *Wilko* v. *Swan*, 346 U. S. 427 (1953).

The Court's opinions in *Alexander*, *Barrentine*, *McDonald*, and *Wilko* all explain why it makes good sense to draw a distinction between statutory claims and contract claims. In view of the Court's repeated recognition of the distinction between federal statutory rights and contractual rights, together with the undisputed historical fact that arbitration has functioned almost entirely in either the area of labor disputes or in "ordinary disputes between merchants as to questions of fact," see n. 11, *supra*, it is reasonable to assume that most lawyers and executives would not expect the language in the standard arbitration clause to cover federal statutory claims. Thus, in my opinion, both a fair respect for the importance of the interests that Congress has identified as worthy of federal statutory protection, and a fair appraisal of the most likely understanding of the parties who sign agreements containing standard arbitration clauses, support a presumption that such clauses do not apply to federal statutory claims.

III

The Court has repeatedly held that a decision by Congress to create a special statutory remedy renders a private agreement to arbitrate a federal statutory claim unenforceable. Thus, as I have already noted, the express statutory remedy provided in the Ku Klux Act of 1871,[15] the express statutory remedy in the Securities Act of 1933,[16] the express statutory remedy in the Fair Labor Standards Act,[17] and the express

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[15] *McDonald* v. *City of West Branch*, 466 U. S. 284 (1984).

[16] *Wilko* v. *Swan*, 346 U. S. 427 (1953).

[17] *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728 (1981).

statutory remedy in Title VII of the Civil Rights Act of 1964,[18] each provided the Court with convincing evidence that Congress did not intend the protections afforded by the statute to be administered by a private arbitrator. The reasons that motivated those decisions apply with special force to the federal policy that is protected by the antitrust laws.

To make this point it is appropriate to recall some of our past appraisals of the importance of this federal policy and then to identify some of the specific remedies Congress has designed to implement it. It was Chief Justice Hughes who characterized the Sherman Antitrust Act as "a charter of freedom" that may fairly be compared to a constitutional provision. See *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 359–360 (1933). In *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 371 (1963), the Court referred to the extraordinary "magnitude" of the value choices made by Congress in enacting the Sherman Act. More recently, the Court described the weighty public interests underlying the basic philosophy of the statute:

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972).

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[18] *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974).

The Sherman and Clayton Acts reflect Congress' appraisal of the value of economic freedom; they guarantee the vitality of the entrepreneurial spirit. Questions arising under these Acts are among the most important in public law.

The unique public interest in the enforcement of the antitrust laws is repeatedly reflected in the special remedial scheme enacted by Congress. Since its enactment in 1890, the Sherman Act has provided for public enforcement through criminal as well as civil sanctions. The pre-eminent federal interest in effective enforcement once justified a provision for special three-judge district courts to hear antitrust claims on an expedited basis, as well as for direct appeal to this Court bypassing the courts of appeals.[19] See, *e. g.*, *United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U. S. 694 (1975).

The special interest in encouraging private enforcement of the Sherman Act has been reflected in the statutory scheme ever since 1890. Section 7 of the original Act,[20] used the broadest possible language to describe the class of litigants who may invoke its protection. "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948); see also *Associ-*

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[19] See 32 Stat. 823, 88 Stat. 1708, repealed 98 Stat. 3358 (Pub. L. 98–620, § 402(11)). The Act still provides an avenue for directly appealing to this Court from a final judgment in a Government antitrust suit. 15 U. S. C. § 29(b).

[20] "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." 26 Stat. 210.

The current version of the private remedy is codified at 15 U. S. C. § 15(a).

ated General Contractors of California, Inc. v. *Carpenters*, 459 U. S. 519, 529 (1983).

The provision for mandatory treble damages—unique in federal law when the statute was enacted—provides a special incentive to the private enforcement of the statute, as well as an especially powerful deterrent to violators.[21] What we have described as "the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 329 (1955), is buttressed by the statutory mandate that the injured party also recover costs, "including a reasonable attorney's fee." 15 U. S. C. § 15(a). The interest in wide and effective enforcement has thus, for almost a century, been vindicated by enlisting the assistance

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[21] "We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. It was for this reason that we held in *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951), that a plaintiff in an antitrust suit could not be barred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violation. Similarly, in *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964), we held that a dealer whose consignment agreement was canceled for failure to adhere to a fixed resale price could bring suit under the antitrust laws even though by signing the agreement he had to that extent become a participant in the illegal, competition-destroying scheme. Both *Simpson* and *Kiefer-Stewart* were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 138–139 (1968).

of "private Attorneys General";[22] we have always attached special importance to their role because "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress." *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 262 (1972).

There are, in addition, several unusual features of the antitrust enforcement scheme that unequivocally require rejection of any thought that Congress would tolerate private arbitration of antitrust claims in lieu of the statutory remedies that it fashioned. As we explained in *Blumenstock Brothers Advertising Agency* v. *Curtis Publishing Co.*, 252 U. S. 436, 440 (1920), an antitrust treble-damages case "can only be brought in a District Court of the United States." The determination that these cases are "too important to be decided otherwise than by competent tribunals"[23] surely cannot allow private arbitrators to assume a jurisdiction that is denied to courts of the sovereign States.

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[22] Under the Panama Canal Act, any private shipper—in addition to the United States—may also bring an action seeking to bar access to the canal for any vessel owned by a company "doing business" in violation of the antitrust laws. 37 Stat. 567, 15 U. S. C. § 31.

[23] In *University Life Insurance Co.* v. *Unimarc Ltd.*, 699 F. 2d 846 (CA7 1983), Judge Posner wrote:

"The suit brought by Unimarc and Huff . . . raises issues of state tort and contract law and federal antitrust law. The tort and contract issues may or may not be within the scope of the arbitration clauses in the coinsurance and second marketing agreements but they are arbitrable in the sense that an agreement to arbitrate them would be enforceable. Federal antitrust issues, however, are nonarbitrable in just that sense. *Applied Digital Technology, Inc.* v. *Continental Casualty Co.*, 576 F. 2d 116, 117 (7th Cir. 1978). They are considered to be at once too difficult to be decided competently by arbitrators—who are not judges, and often not even lawyers—and too important to be decided otherwise than by competent tribunals. See *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F. 2d 821, 826–27 (2d Cir. 1968). The root of the doctrine is in the same soil as the principle, announced in *Blumenstock Bros. Adv. Agency* v. *Curtis Pub. Co.*, 252 U. S. 436, 440–41 (1920), that federal antitrust suits may not be brought in state courts." *Id.*, at 850–851.

The extraordinary importance of the private antitrust remedy has been emphasized in other statutes enacted by Congress. Thus, in 1913, Congress passed a special Act guaranteeing public access to depositions in Government civil proceedings to enforce the Sherman Act. 37 Stat. 731, 15 U. S. C. § 30.[24] The purpose of that Act plainly was to enable victims of antitrust violations to make evidentiary use of information developed in a public enforcement proceeding. This purpose was further implemented in the following year by the enactment of § 5 of the Clayton Act providing that a final judgment or decree in a Government case may constitute prima facie proof of a violation in a subsequent treble-damages case. 38 Stat. 731, 15 U. S. C. § 16(a). These special remedial provisions attest to the importance that Congress has attached to the private remedy.

In view of the history of antitrust enforcement in the United States, it is not surprising that all of the federal courts that have considered the question have uniformly and unhesitatingly concluded that agreements to arbitrate federal antitrust issues are not enforceable. In a landmark opinion for the Court of Appeals for the Second Circuit, Judge Feinberg wrote:

> "A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest. . . . Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage. . . . We do not believe that Congress intended such claims to be resolved elsewhere than in the courts. We do not suggest that all antitrust litigations attain these swollen proportions; the courts, no less than the public, are thankful

[24] See *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 683 (1958).

that they do not. But in fashioning a rule to govern the arbitrability of antitrust claims, we must consider the rule's potential effect. For the same reason, it is also proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations." *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F. 2d 821, 826–827 (1968) (footnote omitted).

This view has been followed in later cases from that Circuit[25] and by the First,[26] Fifth,[27] Seventh,[28] Eighth,[29] and Ninth Circuits.[30] It is clearly a correct statement of the law.

This Court would be well advised to endorse the collective wisdom of the distinguished judges of the Courts of Appeals who have unanimously concluded that the statutory remedies fashioned by Congress for the enforcement of the antitrust laws render an agreement to arbitrate antitrust disputes unenforceable. Arbitration awards are only reviewable for manifest disregard of the law, 9 U. S. C. §§ 10, 207, and the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator's decision is virtually

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[25] *N. V. Maatschappij Voor Industriele Waarden* v. *A. O. Smith Corp.*, 532 F. 2d 874, 876 (1976) *(per curiam)*.

[26] 723 F. 2d 155, 162 (1983) (Coffin, J., for the court) (opinion below).

[27] *Cobb* v. *Lewis*, 488 F. 2d 41, 47 (1974) (Wisdom, J., for the court).

[28] *University Life Insurance Co.* v. *Unimarc Ltd.*, 699 F. 2d, at 850–851 (1983) (Posner, J., for the court); *Applied Digital Technology, Inc.* v. *Continental Casualty Co.*, 576 F. 2d 116, 117 (1978) (Pell, J., for the court).

[29] *Helfenbein* v. *International Industries, Inc.*, 438 F. 2d 1068, 1070 (Lay, J., for the court), cert. denied, 404 U. S. 872 (1971).

[30] *Lake Communications, Inc.* v. *ICC Corp.*, 738 F. 2d 1473, 1477–1480 (1984) (Browning, C. J., for the court); *Varo* v. *Comprehensive Designers, Inc.*, 504 F. 2d 1103, 1104 (1974) (Chambers, J., for the court); *Power Replacements, Inc.* v. *Air Preheater Co.*, 426 F. 2d 980, 983–984 (1970) (Jameson, J., for the court); *A. & E. Plastik Pak Co.* v. *Monsanto Co.*, 396 F. 2d 710, 715–716 (1968) (Merrill, J., for the court).

unreviewable.[31] Despotic decisionmaking of this kind is fine for parties who are willing to agree in advance to settle for a best approximation of the correct result in order to resolve quickly and inexpensively any contractual dispute that may arise in an ongoing commercial relationship. Such informality, however, is simply unacceptable when every error may have devastating consequences for important businesses in our national economy and may undermine their ability to compete in world markets.[32] Instead of "muffling a grievance in the cloakroom of arbitration," the public interest in free competitive markets would be better served by having the issues resolved "in the light of impartial public court adjudication." See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U. S. 117, 136 (1973).[33]

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[31] The arbitration procedure in this case does not provide any right to evidentiary discovery or a written decision, and requires that all proceedings be closed to the public. App. 220–221. Moreover, Japanese arbitrators do not have the power of compulsory process to secure witnesses and documents, nor do witnesses who are available testify under oath. *Id.*, at 218–219. Cf. 9 U. S. C. § 7 (arbitrators may summon witnesses to attend proceedings and seek enforcement in a district court).

[32] The greatest risk, of course, is that the arbitrator will condemn business practices under the antitrust laws that are efficient in a free competitive market. Cf. *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U. S. 284 (1985), rev'g 715 F. 2d 1393 (CA9 1983). In the absence of a reviewable record, a reviewing district court would not be able to undo the damage wrought. Even a Government suit or an action by a private party might not be available to set aside the award.

[33] The Court notes that some courts which have held that agreements to arbitrate antitrust claims generally are unenforceable have nevertheless enforced arbitration agreements to settle an existing antitrust claim. *Ante*, at 633. These settlement agreements, made after the parties have had every opportunity to evaluate the strength of their position, are obviously less destructive of the private treble-damages remedy that Congress provided. Thus, it may well be that arbitration as a means of settling existing disputes is permissible.

IV

The Court assumes for the purposes of its decision that the antitrust issues would not be arbitrable if this were a purely domestic dispute, *ante*, at 629, but holds that the international character of the controversy makes it arbitrable. The holding rests on vague concerns for the international implications of its decision and a misguided application of *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506 (1974).

International Obligations of the United States

Before relying on its own notions of what international comity requires, it is surprising that the Court does not determine the specific commitments that the United States has made to enforce private agreements to arbitrate disputes arising under public law. As the Court acknowledges, the only treaty relevant here is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. [1970] 21 U. S. T. 2517, T. I. A. S. No. 6997. The Convention was adopted in 1958 at a multilateral conference sponsored by the United Nations. This Nation did not sign the proposed convention at that time; displaying its characteristic caution before entering into international compacts, the United States did not accede to it until 12 years later.

As the Court acknowledged in *Scherk* v. *Alberto-Culver Co.*, 417 U. S., at 520, n. 15, the principal purpose of the Convention "was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." However, the United States, as *amicus curiae*, advises the Court that the Convention "clearly contemplates" that signatory nations will enforce domestic laws prohibiting the arbitration of certain subject matters. Brief for United States as *Amicus Curiae* 28. This interpretation of the Convention was adopted by the Court of Appeals, 723 F. 2d, at 162–166, and the Court

declines to reject it, *ante*, at 639–640, n. 21. The construction is beyond doubt.

Article II(3) of the Convention provides that the court of a Contracting State, "when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration." This obligation does not arise, however, (i) if the agreement "is null and void, inoperative or incapable of being performed," Art. II(3), or (ii) if the dispute does not concern "a subject matter capable of settlement by arbitration," Art. II(1). The former qualification principally applies to matters of fraud, mistake, and duress in the inducement, or problems of procedural fairness and feasibility. 723 F. 2d, at 164. The latter clause plainly suggests the possibility that some subject matters are not capable of arbitration under the domestic laws of the signatory nations, and that agreements to arbitrate such disputes need not be enforced.

This construction is confirmed by the provisions of the Convention which provide for the enforcement of international arbitration awards. Article III provides that each "Contracting State shall recognize arbitral awards as binding and enforce them." However, if an arbitration award is "contrary to the public policy of [a] country" called upon to enforce it, or if it concerns a subject matter which is "not capable of settlement by arbitration under the law of that country," the Convention does not require that it be enforced. Arts. V(2)(a) and (b). Thus, reading Articles II and V together, the Convention provides that agreements to arbitrate disputes which are nonarbitrable under domestic law need not be honored, nor awards rendered under them enforced.[34]

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[34] Indeed, it has been argued that a state may refuse to enforce an agreement to arbitrate a subject matter which is nonarbitrable in domestic law under Article II(3) as well as under Article II(1). Since awards rendered under such agreements need not be enforced under Article V(2) the agree-

This construction is also supported by the legislative history of the Senate's advice and consent to the Convention. In presenting the Convention for the Senate's consideration the President offered the following interpretation of Article II(1):

> "The requirement that the agreement apply to a matter capable of settlement by arbitration is necessary in order to take proper account of laws in force in many countries which prohibit the submission of certain questions to arbitration. In some States of the United States, for example, disputes affecting the title to real property are not arbitrable." S. Exec. Doc. E, at 19.

The Senate's consent to the Convention presumably was made in light of this interpretation, and thus it is to be afforded considerable weight. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 184–185 (1982).

International Comity

It is clear then that the international obligations of the United States permit us to honor Congress' commitment to the exclusive resolution of antitrust disputes in the federal courts. The Court today refuses to do so, offering only vague concerns for comity among nations. The courts of other nations, on the other hand, have applied the exception provided in the Convention, and refused to enforce agreements to arbitrate specific subject matters of concern to them.[35]

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ment is "incapable of being performed." Art. II(3). S. Exec. Doc. E, 90th Cong., 2d Sess., 19 (1968) (hereinafter S. Exec. Doc. E); G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards 27–28 (1958).

[35] For example, the Cour de Cassation in Belgium has held that disputes arising under a Belgian statute limiting the unilateral termination of exclusive distributorships are not arbitrable under the Convention in that country, *Audi-NSU Auto Union A. G.* v. *S. A. Adelin Petit & Cie.* (1979), in 5 Yearbook Commercial Arbitration 257, 259 (1980), and the Corte di

It may be that the subject-matter exception to the Convention ought to be reserved—as a matter of domestic law—for matters of the greatest public interest which involve concerns that are shared by other nations. The Sherman Act's commitment to free competitive markets is among our most important civil policies. *Supra*, at 650–657. This commitment, shared by other nations which are signatory to the Convention,[36] is hardly the sort of parochial concern that we should decline to enforce in the interest of international comity. Indeed, the branch of Government entrusted with the conduct of political relations with foreign governments has informed us that the "United States' determination that federal antitrust claims are nonarbitrable under the Convention . . . is not likely to result in either surprise or recrimination on the part of other signatories to the Convention." Brief for United States as *Amicus Curiae* 30.

Lacking any support for the proposition that the enforcement of our domestic laws in this context will result in international recriminations, the Court seeks refuge in an obtuse application of its own precedent, *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506 (1974), in order to defend the contrary result. The *Scherk* case was an action for damages brought by an American purchaser of three European businesses in which it was claimed that the seller's fraudulent representations concerning the status of certain European trademarks constituted a violation of § 10(b) of the Securities Exchange

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Cassazione in Italy has held that labor disputes are not arbitrable under the Convention in that country, *Compagnia Generale Construzioni* v. *Piersanti*, [1980] Foro Italiano I 190, in 6 Yearbook Commercial Arbitration 229, 230 (1981).

[36] For example, the Federal Republic of Germany has a vigorous antitrust program, and prohibits the enforcement of predispute agreements to arbitrate such claims under some circumstances. See Act Against Restraints of Competition § 91(1), in 1 Organisation for Economic Cooperation and Development, Guide to Legislation on Restrictive Business Practices, Part D, p. 49 (1980). See also 2 G. Delaume, Transnational Contracts § 13.06, p. 31, and n. 3 (1982).

Act of 1934, 15 U. S. C. § 78j(b). The Court held that the parties' agreement to arbitrate any dispute arising out of the purchase agreement was enforceable under the Federal Arbitration Act. The legal issue was whether the Court's earlier holding in *Wilko* v. *Swan*, 346 U. S. 427 (1953)—"that an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933," see 417 U. S., at 510—was "controlling authority." *Ibid.*

The Court carefully identified two important differences between the *Wilko* case and the *Scherk* case. First, the statute involved in *Wilko* contained an express private remedy that had "no statutory counterpart" in the statute involved in *Scherk*, see 417 U. S., at 513. Although the Court noted that this difference provided a "colorable argument" for reaching a different result, the Court did not rely on it. *Id.*, at 513–514.

Instead, it based its decision on the second distinction—that the outcome in *Wilko* was governed entirely by American law whereas in *Scherk* foreign rules of law would control and, if the arbitration clause were not enforced, a host of international conflict-of-laws problems would arise. The Court explained:

> "Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement. Alberto-Culver is an American corporation with its principal place of business and the vast bulk of its activity in this country, while Scherk is a citizen of Germany whose companies were organized under the laws of Germany and Liechtenstein. The negotiations leading to the signing of the contract in Austria and to the closing in Switzerland took place in the United States, England, and Germany, and involved consultations with legal and trademark experts from each of those countries and from Liechtenstein. Finally, and most significantly, the subject matter of the contract concerned the

sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets.

"Such a contract involves considerations and policies significantly different from those found controlling in *Wilko*. In *Wilko*, quite apart from the arbitration provision, there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock-purchase agreement. The parties, the negotiations, and the subject matter of the contract were all situated in this country, and no credible claim could have been entertained that any international conflict-of-laws problems would arise. In this case, by contrast, in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract." 417 U. S., at 515–516 (footnote omitted).

Thus, in its opinion in *Scherk*, the Court distinguished *Wilko* because in that case "no credible claim could have been entertained that any international conflict-of-laws problems would arise." 417 U. S., at 516. That distinction fits this case precisely, since I consider it perfectly clear that the rules of American antitrust law must govern the claim of an American automobile dealer that he has been injured by an international conspiracy to restrain trade in the American automobile market.[37]

The critical importance of the foreign-law issues in *Scherk* was apparent to me even before the case reached this Court. See n. 12, *supra*. For that reason, it is especially distress-

[37] Cf. *Compagnia Generale Construzioni* v. *Piersanti*, [1980] Foro Italiano I 190 (Corte Cass. Italy), in 6 Yearbook Commercial Arbitration, at 230; *Audi-NSU Auto Union A. G.* v. *S. A. Adelin Petit & Cie.* (Cour Cass. Belgium 1979), in 5 Yearbook Commercial Arbitration, at 259.

ing to find that the Court is unable to perceive why the reasoning in *Scherk* is wholly inapplicable to Soler's antitrust claims against Chrysler and Mitsubishi. The merits of those claims are controlled entirely by American law. It is true that the automobiles are manufactured in Japan and that Mitsubishi is a Japanese corporation, but the same antitrust questions would be presented if Mitsubishi were owned by two American companies instead of by one American and one Japanese partner. When Mitsubishi enters the American market and plans to engage in business in that market over a period of years, it must recognize its obligation to comply with American law and to be subject to the remedial provisions of American statutes.[38]

The federal claim that was asserted in *Scherk*, unlike Soler's antitrust claim, had not been expressly authorized by Congress. Indeed, until this Court's recent decision in *Landreth Timber Co.* v. *Landreth*, 471 U. S. 681 (1985), the federal cause of action asserted in *Scherk* would not have been entertained in a number of Federal Circuits because it did not involve the kind of securities transaction that Congress intended to regulate when it enacted the Securities Exchange Act of 1934.[39] The fraud claimed in *Scherk* was virtually identical to the breach of warranty claim; arbitration of such claims arising out of an agreement between parties of equal bargaining strength does not conflict with any significant federal policy.

In contrast, Soler's claim not only implicates our fundamental antitrust policies, *supra*, at 650–657, but also should

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[38] Cf. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176 (1982) (Japanese general trading company's wholly owned subsidiary which is incorporated in the United States is not exempt under bilateral commercial treaty from obligations under Title VII of the Civil Rights Act of 1964).

[39] The Court's opinion in *Landreth Timber*, 471 U. S., at 694–695, n. 7, does not take issue with my assertion, in dissent, that Congress never "intended to cover negotiated transactions involving the sale of control of a business whose securities have never been offered or sold in any public market." *Id.*, at 699.

be evaluated in the light of an explicit congressional finding concerning the disparity in bargaining power between automobile manufacturers and their franchised dealers. In 1956, when Congress enacted special legislation to protect dealers from bad-faith franchise terminations,[40] it recited its intent "to balance the power now heavily weighted in favor of automobile manufacturers." 70 Stat. 1125. The special federal interest in protecting automobile dealers from overreaching by car manufacturers, as well as the policies underlying the Sherman Act, underscore the folly of the Court's decision today.

V

The Court's repeated incantation of the high ideals of "international arbitration" creates the impression that this case involves the fate of an institution designed to implement a formula for world peace.[41] But just as it is improper to subordinate the public interest in enforcement of antitrust policy to the private interest in resolving commercial disputes, so is it equally unwise to allow a vision of world unity to distort the importance of the selection of the proper forum for resolving this dispute. Like any other mechanism for resolving controversies, international arbitration will only succeed if it is realistically limited to tasks it is capable of performing well—the prompt and inexpensive resolution of essentially contractual disputes between commercial partners. As for matters involving the political passions and the fundamental interests of nations, even the multilateral convention adopted under the auspices of the United Nations recognizes that private international arbitration is incapable of achieving satisfactory results.

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[40] Automobile Dealer's Day in Court Act, 15 U. S. C. §§ 1221–1225.

[41] *E. g.*, Charter of the United Nations and Statute of the International Court of Justice, 59 Stat. 1031, T. S. No. 993 (1945); Constitution of the International Labor Organisation, 49 Stat. 2712, T. S. No. 874 (1934); Treaty of Versailles, S. Doc. 49, 66th Cong., 1st Sess., pt. 1, pp. 8–17 (1919) (Covenant of the League of Nations); Kant, Perpetual Peace, A Philosophical Sketch, in Kant's Political Writings 93 (H. Reiss ed. 1971).

In my opinion, the elected representatives of the American people would not have us dispatch an American citizen to a foreign land in search of an uncertain remedy for the violation of a public right that is protected by the Sherman Act. This is especially so when there has been no genuine bargaining over the terms of the submission, and the arbitration remedy provided has not even the most elementary guarantees of fair process. Consideration of a fully developed record by a jury, instructed in the law by a federal judge, and subject to appellate review, is a surer guide to the competitive character of a commercial practice than the practically unreviewable judgment of a private arbitrator.

Unlike the Congress that enacted the Sherman Act in 1890, the Court today does not seem to appreciate the value of economic freedom. I respectfully dissent.

UNITED STATES *v.* BAGLEY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–48. Argued March 20, 1985—Decided July 2, 1985

Respondent was indicted on charges of violating federal narcotics and firearms statutes. Before trial, he filed a discovery motion requesting, *inter alia*, "any deals, promises or inducements made to [Government] witnesses in exchange for their testimony." The Government's response did not disclose that any "deals, promises or inducements" had been made to its two principal witnesses, who had assisted the Bureau of Alcohol, Tobacco and Firearms (ATF) in conducting an undercover investigation of respondent. But the Government did produce signed affidavits by these witnesses recounting their undercover dealing with respondent and concluding with the statement that the affidavits were made without any threats or rewards or promises of reward. Respondent waived his right to a jury trial and was tried before the District Court. The two principal Government witnesses testified about both the firearms and narcotics charges, and the court found respondent guilty on the narcotics charges but not guilty on the firearms charges. Subsequently, in response to requests made pursuant to the Freedom of Information Act and the Privacy Act, respondent received copies of ATF contracts signed by the principal Government witnesses during the undercover investigation and stating that the Government would pay money to the witnesses commensurate with the information furnished. Respondent then moved to vacate his sentence, alleging that the Government's failure in response to the discovery motion to disclose these contracts, which he could have used to impeach the witnesses, violated his right to due process under *Brady* v. *Maryland*, 373 U. S. 83, which held that the prosecution's suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment. The District Court denied the motion, finding beyond a reasonable doubt that had the existence of the ATF contracts been disclosed to it during trial, the disclosure would not have affected the outcome, because the principal Government witnesses' testimony was primarily devoted to the firearms charges on which respondent was acquitted, and was exculpatory on the narcotics charges. The Court of Appeals reversed, holding that the Government's failure to disclose the requested impeachment evidence that respondent could have used to conduct an effective cross-examination of the Government's prin-

cipal witnesses required automatic reversal. The Court of Appeals also stated that it "disagree[d]" with the District Court's conclusion that the nondisclosure was harmless beyond a reasonable doubt, noting that the witnesses' testimony was in fact inculpatory on the narcotics charges.

Held: The judgment is reversed, and the case is remanded.

719 F. 2d 1462, reversed and remanded.

JUSTICE BLACKMUN delivered the opinion of the Court with respect to Parts I and II, concluding that the Court of Appeals erred in holding that the prosecutor's failure to disclose evidence that could have been used effectively to impeach important Government witnesses requires automatic reversal. Such nondisclosure constitutes constitutional error and requires reversal of the conviction only if the evidence is material in the sense that its suppression might have affected the outcome of the trial. Pp. 674–678.

JUSTICE BLACKMUN, joined by JUSTICE O'CONNOR, delivered an opinion with respect to Part III, concluding that the nondisclosed evidence at issue is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. This standard of materiality is sufficiently flexible to cover cases of prosecutorial failure to disclose evidence favorable to the defense regardless of whether the defense makes no request, a general request, or a specific request. Although the prosecutor's failure to respond fully to a specific request may impair the adversary process by having the effect of representing to the defense that certain evidence does not exist, this possibility of impairment does not necessitate a different standard of materiality. Under the standard stated above, the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. Pp. 678–684.

JUSTICE WHITE, joined by THE CHIEF JUSTICE and JUSTICE REHNQUIST, being of the view that there is no reason to elaborate on the relevance of the specificity of the defense's request for disclosure, either generally or with respect to this case, concluded that reversal was mandated simply because the Court of Appeals failed to apply the "reasonable probability" standard of materiality to the nondisclosed evidence in question. P. 685.

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined, and an opinion with respect to Part III, in which O'CONNOR, J., joined. WHITE, J., filed

an opinion concurring in part and concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 685. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 685. STEVENS, J., filed a dissenting opinion, *post*, p. 709. POWELL, J., took no part in the decision of the case.

David A. Strauss argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Trott*, and *Deputy Solicitor General Frey*.

Thomas W. Hillier II argued the cause and filed a brief for respondent.*

JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion of the Court except as to Part III.

In *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." The issue in the present case concerns the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecutor failed to disclose requested evidence that could have been used to impeach Government witnesses.

I

In October 1977, respondent Hughes Anderson Bagley was indicted in the Western District of Washington on 15 charges of violating federal narcotics and firearms statutes. On November 18, 24 days before trial, respondent filed a discovery motion. The sixth paragraph of that motion requested:

> "The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, and any deals, promises or induce-

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**John K. Van de Kamp*, Attorney General, and *Karl S. Mayer*, *Thomas A. Brady*, and *Charles R. B. Kirk*, Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging reversal.

ments made to witnesses in exchange for their testimony." App. 18.[1]

The Government's two principal witnesses at the trial were James F. O'Connor and Donald E. Mitchell. O'Connor and Mitchell were state law enforcement officers employed by the Milwaukee Railroad as private security guards. Between April and June 1977, they assisted the federal Bureau of Alcohol, Tobacco and Firearms (ATF) in conducting an undercover investigation of respondent.

The Government's response to the discovery motion did not disclose that any "deals, promises or inducements" had been made to O'Connor or Mitchell. In apparent reply to a request in the motion's ninth paragraph for "[c]opies of all Jencks Act material,"[2] the Government produced a series of affidavits that O'Connor and Mitchell had signed between April 12 and May 4, 1977, while the undercover investigation was in progress. These affidavits recounted in detail the undercover dealings that O'Connor and Mitchell were having at the time with respondent. Each affidavit concluded with the statement, "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it."[3]

Respondent waived his right to a jury trial and was tried before the court in December 1977. At the trial, O'Connor

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[1] In addition, ¶ 10(b) of the motion requested "[p]romises or representations made to any persons the government intends to call as witnesses at trial, including but not limited to promises of no prosecution, immunity, lesser sentence, etc.," and ¶ 11 requested "[a]ll information which would establish the reliability of the Milwaukee Railroad Employees in this case, whose testimony formed the basis for the search warrant." App. 18–19.

[2] The Jencks Act, 18 U. S. C. § 3500, requires the prosecutor to disclose, after direct examination of a Government witness and on the defendant's motion, any statement of the witness in the Government's possession that relates to the subject matter of the witness' testimony.

[3] Brief for United States 3, quoting Memorandum of Points and Authorities in Support of Pet. for Habeas Corpus, CV80–3592–RJK(M) (CD Cal.) Exhibits 1–9.

and Mitchell testified about both the firearms and the narcotics charges. On December 23, the court found respondent guilty on the narcotics charges, but not guilty on the firearms charges.

In mid-1980, respondent filed requests for information pursuant to the Freedom of Information Act and to the Privacy Act of 1974, 5 U. S. C. §§552 and 552a. He received in response copies of ATF form contracts that O'Connor and Mitchell had signed on May 3, 1977. Each form was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor." The printed portion of the form stated that the vendor "will provide" information to ATF and that "upon receipt of such information by the Regional Director, Bureau of Alcohol, Tobacco and Firearms, or his representative, and upon the accomplishment of the objective sought to be obtained by the use of such information to the satisfaction of said Regional Director, the United States will pay to said vendor a sum commensurate with services and information rendered." App. 22 and 23. Each form contained the following typewritten description of services:

> "That he will provide information regarding T–I and other violations committed by Hughes A. Bagley, Jr.; that he will purchase evidence for ATF; that he will cut *[sic]* in an undercover capacity for ATF; that he will assist ATF in gathering of evidence and testify against the violator in federal court." *Ibid.*

The figure "$300.00" was handwritten in each form on a line entitled "Sum to Be Paid to Vendor."

Because these contracts had not been disclosed to respondent in response to his pretrial discovery motion,[4] respondent moved under 28 U. S. C. §2255 to vacate his sentence. He

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[4]The Assistant United States Attorney who prosecuted respondent stated in stipulated testimony that he had not known that the contracts existed and that he would have furnished them to respondent had he known of them. See App. to Pet. for Cert. 13a.

alleged that the Government's failure to disclose the contracts, which he could have used to impeach O'Connor and Mitchell, violated his right to due process under *Brady* v. *Maryland*, *supra*.

The motion came before the same District Judge who had presided at respondent's bench trial. An evidentiary hearing was held before a Magistrate. The Magistrate found that the printed form contracts were blank when O'Connor and Mitchell signed them and were not signed by an ATF representative until after the trial. He also found that on January 4, 1978, following the trial and decision in respondent's case, ATF made payments of $300 to both O'Connor and Mitchell pursuant to the contracts.[5] Although the ATF case agent who dealt with O'Connor and Mitchell testified that these payments were compensation for expenses, the Magistrate found that this characterization was not borne out by the record. There was no documentation for expenses in these amounts; Mitchell testified that his payment was not for expenses, and the ATF forms authorizing the payments treated them as rewards.

The District Court adopted each of the Magistrate's findings except for the last one to the effect that "[n]either O'Connor nor Mitchell expected to receive the payment of $300 or any payment from the United States for their testimony." App. to Pet. for Cert. 7a, 12a, 14a. Instead, the court found that it was "probable" that O'Connor and Mitchell expected to receive compensation, in addition to their expenses, for their assistance, "though perhaps not for their testimony." *Id.*, at 7a. The District Court also expressly rejected, *ibid.*, the Magistrate's conclusion, *id.*, at 14a, that:

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[5] The Magistrate found, too, that ATF paid O'Connor and Mitchell, respectively, $90 and $80 in April and May 1977 before trial, but concluded that these payments were intended to reimburse O'Connor and Mitchell for expenses, and would not have provided a basis for impeaching O'Connor's and Mitchell's trial testimony. The District Court adopted this finding and conclusion. *Id.*, at 7a, 13a.

> "Because neither witness was promised or expected payment for his testimony, the United States did not withhold, during pretrial discovery, information as to any 'deals, promises or inducements' to these witnesses. Nor did the United States suppress evidence favorable to the defendant, in violation of *Brady* v. *Maryland*, 373 U. S. 83 (1963)."

The District Court found beyond a reasonable doubt, however, that had the existence of the agreements been disclosed to it during trial, the disclosure would have had no effect upon its finding that the Government had proved beyond a reasonable doubt that respondent was guilty of the offenses for which he had been convicted. *Id.*, at 8a. The District Court reasoned: Almost all of the testimony of both witnesses was devoted to the firearms charges in the indictment. Respondent, however, was acquitted on those charges. The testimony of O'Connor and Mitchell concerning the narcotics charges was relatively very brief. On cross-examination, respondent's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies that had been prescribed for respondent's personal use. The answers of O'Connor and Mitchell to this line of cross-examination tended to be favorable to respondent. Thus, the claimed impeachment evidence would not have been helpful to respondent and would not have affected the outcome of the trial. Accordingly, the District Court denied respondent's motion to vacate his sentence.

The United States Court of Appeals for the Ninth Circuit reversed. *Bagley* v. *Lumpkin*, 719 F. 2d 1462 (1983). The Court of Appeals began by noting that, according to precedent in the Circuit, prosecutorial failure to respond to a specific *Brady* request is properly analyzed as error, and a resulting conviction must be reversed unless the error is harmless beyond a reasonable doubt. The court noted that the District Judge who had presided over the bench trial

concluded beyond a reasonable doubt that disclosure of the ATF agreement would not have affected the outcome. The Court of Appeals, however, stated that it "disagree[d]" with this conclusion. *Id.*, at 1464. In particular, it disagreed with the Government's—and the District Court's—premise that the testimony of O'Connor and Mitchell was exculpatory on the narcotics charges, and that respondent therefore would not have sought to impeach "his own witness." *Id.*, at 1464, n. 1.

The Court of Appeals apparently based its reversal, however, on the theory that the Government's failure to disclose the requested *Brady* information that respondent could have used to conduct an effective cross-examination impaired respondent's right to confront adverse witnesses. The court noted: "In *Davis* v. *Alaska*, . . . the Supreme Court held that the denial of the 'right of *effective* cross-examination' was '"constitutional error of the first magnitude"' requiring automatic reversal." 719 F. 2d, at 1464 (quoting *Davis* v. *Alaska*, 415 U. S. 308, 318 (1974)) (emphasis added by Court of Appeals). In the last sentence of its opinion, the Court of Appeals concluded: "we hold that the government's failure to provide requested *Brady* information to Bagley so that he could effectively cross-examine two important government witnesses requires an automatic reversal." 719 F. 2d, at 1464.

We granted certiorari, 469 U. S. 1016 (1984), and we now reverse.

II

The holding in *Brady* v. *Maryland* requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." 373 U. S., at 87. See also *Moore* v. *Illinois*, 408 U. S. 786, 794–795 (1972). The Court explained in *United States* v. *Agurs*, 427 U. S. 97, 104 (1976): "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of

the trial." The evidence suppressed in *Brady* would have been admissible only on the issue of punishment and not on the issue of guilt, and therefore could have affected only Brady's sentence and not his conviction. Accordingly, the Court affirmed the lower court's restriction of Brady's new trial to the issue of punishment.

The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.[6] Thus, the prosecutor is not required to deliver his entire file to defense counsel,[7] but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial:

> "For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose. . . .
>
> ". . . But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclo-

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[6] By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U. S. 78, 88 (1935). See *Brady* v. *Maryland*, 373 U. S., at 87–88.

[7] See *United States* v. *Agurs*, 427 U. S. 97, 106, 111 (1976); *Moore* v. *Illinois*, 408 U. S. 786, 795 (1972). See also *California* v. *Trombetta*, 467 U. S. 479, 488, n. 8 (1984). An interpretation of *Brady* to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice." *Giles* v. *Maryland*, 386 U. S. 66, 117 (1967) (dissenting opinion). Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments.

sure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 427 U. S., at 108.

In *Brady* and *Agurs*, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. See *Giglio* v. *United States*, 405 U. S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," *Brady*, 373 U. S., at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue* v. *Illinois*, 360 U. S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

The Court of Appeals treated impeachment evidence as constitutionally different from exculpatory evidence. According to that court, failure to disclose impeachment evidence is "even more egregious" than failure to disclose exculpatory evidence "because it threatens the defendant's right to confront adverse witnesses." 719 F. 2d, at 1464. Relying on *Davis* v. *Alaska*, 415 U. S. 308 (1974), the Court of Appeals held that the Government's failure to disclose requested impeachment evidence that the defense could use to conduct an effective cross-examination of important prosecution witnesses constitutues "'constitutional error of the first magnitude'" requiring automatic reversal. 719 F. 2d, at 1464 (quoting *Davis* v. *Alaska*, *supra*, at 318).

This Court has rejected any such distinction between impeachment evidence and exculpatory evidence. In *Giglio* v. *United States*, *supra*, the Government failed to disclose impeachment evidence similar to the evidence at issue in the present case, that is, a promise made to the key Government

witness that he would not be prosecuted if he testified for the Government. This Court said:

> "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within th[e] general rule [of *Brady*]. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . .' A finding of materiality of the evidence is required under *Brady*. . . . A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .'" 405 U. S., at 154 (citations omitted).

Thus, the Court of Appeals' holding is inconsistent with our precedents.

Moreover, the court's reliance on *Davis* v. *Alaska* for its "automatic reversal" rule is misplaced. In *Davis*, the defense sought to cross-examine a crucial prosecution witness concerning his probationary status as a juvenile delinquent. The defense intended by this cross-examination to show that the witness might have made a faulty identification of the defendant in order to shift suspicion away from himself or because he feared that his probationary status would be jeopardized if he did not satisfactorily assist the police and prosecutor in obtaining a conviction. Pursuant to a state rule of procedure and a state statute making juvenile adjudications inadmissible, the trial judge prohibited the defense from conducting the cross-examination. This Court reversed the defendant's conviction, ruling that the direct restriction on the scope of cross-examination denied the defendant "the right of effective cross-examination which '"would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart* v. *Janis*, 384 U. S. 1, 3.'" 415 U. S., at 318 (quoting *Smith*

v. *Illinois*, 390 U. S. 129, 131 (1968)). See also *United States* v. *Cronic*, 466 U. S. 648, 659 (1984).

The present case, in contrast, does not involve any direct restriction on the scope of cross-examination. The defense was free to cross-examine the witnesses on any relevant subject, including possible bias or interest resulting from inducements made by the Government. The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination. As discussed above, such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with "our overriding concern with the justice of the finding of guilt," *United States* v. *Agurs*, 427 U. S., at 112, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.

III

A

It remains to determine the standard of materiality applicable to the nondisclosed evidence at issue in this case. Our starting point is the framework for evaluating the materiality of *Brady* evidence established in *United States* v. *Agurs*. The Court in *Agurs* distinguished three situations involving the discovery, after trial, of information favorable to the accused that had been known to the prosecution but unknown to the defense. The first situation was the prosecutor's knowing use of perjured testimony or, equivalently, the prosecutor's knowing failure to disclose that testimony used to convict the defendant was false. The Court noted the well-established rule that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

427 U. S., at 103 (footnote omitted).[8] Although this rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review,[9] it may as

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[8] In fact, the *Brady* rule has its roots in a series of cases dealing with convictions based on the prosecution's knowing use of perjured testimony. In *Mooney* v. *Holohan*, 294 U. S. 103 (1935), the Court established the rule that the knowing use by a state prosecutor of perjured testimony to obtain a conviction and the deliberate suppression of evidence that would have impeached and refuted the testimony constitutes a denial of due process. The Court reasoned that "a deliberate deception of court and jury by the presentation of testimony known to be perjured" is inconsistent with "the rudimentary demands of justice." *Id.*, at 112. The Court reaffirmed this principle in broader terms in *Pyle* v. *Kansas*, 317 U. S. 213 (1942), where it held that allegations that the prosecutor had deliberately suppressed evidence favorable to the accused and had knowingly used perjured testimony were sufficient to charge a due process violation.

The Court again reaffirmed this principle in *Napue* v. *Illinois*, 360 U. S. 264 (1959). In *Napue*, the principal witness for the prosecution falsely testified that he had been promised no consideration for his testimony. The Court held that the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared. The Court explained that the principle that a State may not knowingly use false testimony to obtain a conviction—even false testimony that goes only to the credibility of the witness—is "implicit in any concept of ordered liberty." *Id.*, at 269. Finally, the Court held that it was not bound by the state court's determination that the false testimony "could not in any reasonable likelihood have affected the judgment of the jury." *Id.*, at 271. The Court conducted its own independent examination of the record and concluded that the false testimony "may have had an effect on the outcome of the trial." *Id.*, at 272. Accordingly, the Court reversed the judgment of conviction.

[9] The rule that a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict derives from *Napue* v. *Illinois*, 360 U. S., at 271. See n. 8, *supra*. See also *Giglio* v. *United States*, 405 U. S. 150, 154 (1972) (quoting *Napue*, 360 U. S., at 271). *Napue* antedated *Chapman* v. *California*, 386 U. S. 18 (1967), where the "harmless beyond a reasonable doubt" standard was established. The Court in *Chapman* noted that there was little, if any, difference between

easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt. The Court in *Agurs* justified this standard of materiality on the ground that the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves "a corruption of the truth-seeking function of the trial process." *Id.*, at 104.

At the other extreme is the situation in *Agurs* itself, where the defendant does not make a *Brady* request and the prosecutor fails to disclose certain evidence favorable to the accused. The Court rejected a harmless-error rule in that situation, because under that rule every nondisclosure is treated as error, thus imposing on the prosecutor a constitutional duty to deliver his entire file to defense counsel.[10] 427 U. S., at 111–112. At the same time, the Court rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal. *Id.*, at 111. The Court reasoned: "If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Ibid.* The

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a rule formulated, as in *Napue*, in terms of "'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,'" and a rule "'requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" 386 U. S., at 24 (quoting *Fahy* v. *Connecticut*, 375 U. S. 85, 86–87 (1963)). It is therefore clear, as indeed the Government concedes, see Brief for United States 20, and 36–38, that this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman* harmless-error standard.

[10] This is true only if the nondisclosure is treated as error subject to harmless-error review, and not if the nondisclosure is treated as error only if the evidence is material under a not "harmless beyond a reasonable doubt" standard.

standard of materiality applicable in the absence of a specific *Brady* request is therefore stricter than the harmless-error standard but more lenient to the defense than the newly-discovered-evidence standard.

The third situation identified by the Court in *Agurs* is where the defense makes a specific request and the prosecutor fails to disclose responsive evidence.[11] The Court did not define the standard of materiality applicable in this situation,[12] but suggested that the standard might be more lenient to the defense than in the situation in which the defense makes no request or only a general request. 427 U. S., at 106. The Court also noted: "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Ibid.*

The Court has relied on and reformulated the *Agurs* standard for the materiality of undisclosed evidence in two subsequent cases arising outside the *Brady* context. In neither case did the Court's discussion of the *Agurs* standard distinguish among the three situations described in *Agurs*. In *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 874 (1982), the Court held that due process is violated when testimony is made unavailable to the defense by Government deportation of witnesses "only if there is a reasonable likelihood that the testimony could have affected the judgment of the

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[11] The Court in *Agurs* identified *Brady* as a case in which specific information was requested by the defense. 427 U. S., at 106. The request in *Brady* was for the extrajudicial statements of Brady's accomplice. See 373 U. S., at 84.

[12] The Court in *Agurs* noted: "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." 427 U. S., at 104. Since the *Agurs* Court identified *Brady* as a "specific request" case, see n. 11, *supra*, this language might be taken as indicating the standard of materiality applicable in such a case. It is clear, however, that the language merely explains the meaning of the term "materiality." It does not establish a standard of materiality because it does not indicate what quantum of likelihood there must be that the undisclosed evidence would have affected the outcome.

trier of fact." And in *Strickland* v. *Washington*, 466 U. S. 668 (1984), the Court held that a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694.[13] The *Strickland* Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Ibid.*

We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

The Government suggests that a materiality standard more favorable to the defendant reasonably might be adopted in specific request cases. See Brief for United States 31. The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued. *Ibid.*

We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the

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[13] In particular, the Court explained in *Strickland:* "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U. S., at 695.

nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. This possibility of impairment does not necessitate a different standard of materiality, however, for under the *Strickland* formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

B

In the present case, we think that there is a significant likelihood that the prosecutor's response to respondent's discovery motion misleadingly induced defense counsel to believe that O'Connor and Mitchell could not be impeached on the basis of bias or interest arising from inducements offered by the Government. Defense counsel asked the prosecutor to disclose any inducements that had been made to witnesses, and the prosecutor failed to disclose that the possibility of a reward had been held out to O'Connor and Mitchell if the information they supplied led to "the accomplishment of the objective sought to be obtained . . . to the satisfaction of [the Government]." App. 22 and 23. This possibility of a reward gave O'Connor and Mitchell a direct, personal stake in respondent's conviction. The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction. Moreover, the prosecutor disclosed affidavits that stated that O'Connor and Mitchell received no promises of reward in return for providing information in the affidavits implicating respondent in

criminal activity. In fact, O'Connor and Mitchell signed the last of these affidavits the very day after they signed the ATF contracts. While the Government is technically correct that the blank contracts did not constitute a "promise of reward," the natural effect of these affidavits would be misleadingly to induce defense counsel to believe that O'Connor and Mitchell provided the information in the affidavits, and ultimately their testimony at trial recounting the same information, without any "inducements."

The District Court, nonetheless, found beyond a reasonable doubt that, had the information that the Government held out the possibility of reward to its witnesses been disclosed, the result of the criminal prosecution would not have been different. If this finding were sustained by the Court of Appeals, the information would be immaterial even under the standard of materiality applicable to the prosecutor's knowing use of perjured testimony. Although the express holding of the Court of Appeals was that the nondisclosure in this case required automatic reversal, the Court of Appeals also stated that it "disagreed" with the District Court's finding of harmless error. In particular, the Court of Appeals appears to have disagreed with the factual premise on which this finding expressly was based. The District Court reasoned that O'Connor's and Mitchell's testimony was exculpatory on the narcotics charges. The Court of Appeals, however, concluded, after reviewing the record, that O'Connor's and Mitchell's testimony was in fact inculpatory on those charges. 719 F. 2d, at 1464, n. 1. Accordingly, we reverse the judgment of the Court of Appeals and remand the case to that court for a determination whether there is a reasonable probability that, had the inducement offered by the Government to O'Connor and Mitchell been disclosed to the defense, the result of the trial would have been different.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part and concurring in the judgment.

I agree with the Court that respondent is not entitled to have his conviction overturned unless he can show that the evidence withheld by the Government was "material," and I therefore join Parts I and II of the Court's opinion. I also agree with JUSTICE BLACKMUN that for purposes of this inquiry, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Ante*, at 682. As the Justice correctly observes, this standard is "sufficiently flexible" to cover all instances of prosecutorial failure to disclose evidence favorable to the accused. *Ibid.* Given the flexibility of the standard and the inherently fact-bound nature of the cases to which it will be applied, however, I see no reason to attempt to elaborate on the relevance to the inquiry of the specificity of the defense's request for disclosure, either generally or with respect to this case. I would hold simply that the proper standard is one of reasonable probability and that the Court of Appeals' failure to apply this standard necessitates reversal. I therefore concur in the judgment.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

When the Government withholds from a defendant evidence that might impeach the prosecution's *only witnesses*, that failure to disclose cannot be deemed harmless error. Because that is precisely the nature of the undisclosed evidence in this case, I would affirm the judgment of the Court of Appeals and would not remand for further proceedings.

I

The federal grand jury indicted the respondent, Hughes Anderson Bagley, on charges involving possession of fire-

arms and controlled substances with intent to distribute. Following a bench trial, Bagley was found not guilty of the firearms charges, guilty of two counts of knowingly and intentionally distributing Valium, and guilty of several counts of a lesser included offense of possession of controlled substances. He was sentenced to six months' imprisonment and a special parole term of five years on the first count of distribution, and to three years of imprisonment, which were suspended, and five years' probation, on the second distribution count. He received a suspended sentence and five years' probation for the possession convictions.

The record plainly demonstrates that on the two counts for which Bagley received sentences of imprisonment, the Government's entire case hinged on the testimony of two private security guards who aided the Bureau of Alcohol, Tobacco and Firearms (ATF) in its investigation of Bagley. In 1977 the two guards, O'Connor and Mitchell, worked for the Milwaukee Railroad; for about three years, they had been social acquaintances of Bagley, with whom they often shared coffee breaks. 7 Tr. 2–3; 8 Tr. 2a–3a. At trial, they testified that on two separate occasions they had visited Bagley at his home, where Bagley had responded to O'Connor's complaint that he was extremely anxious by giving him Valium pills. In total, Bagley received $8 from O'Connor, representing the cost of the pills. At trial, Bagley testified that he had a prescription for the Valium because he suffered from a bad back, 14 Tr. 963–964. No testimony to the contrary was introduced. O'Connor and Mitchell each testified that they had worn concealed transmitters and body recorders at these meetings, but the tape recordings were insufficiently clear to be admitted at trial and corroborate their testimony.

Before trial, counsel for Bagley had filed a detailed discovery motion requesting, among other things, "any deals, promises or inducements made to witnesses in exchange for their testimony." App. 17–19. In response to the discovery request, the Government had provided affidavits sworn by

O'Connor and Mitchell that had been prepared during their investigation of Bagley. Each affidavit recounted in detail the dealings the witnesses had had with Bagley and closed with the declaration, "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." Brief for United States 3, quoting Memorandum of Points and Authorities in Support of Pet. for Habeas Corpus, CV80–3592–RJK(M) (CD Cal.) Exhibits 1–9. Both of these agents testified at trial thereafter, and the Government did not disclose the existence of any deals, promises, or inducements. Counsel for Bagley asked O'Connor on cross-examination whether he was testifying in response to pressure or threats from the Government about his job, and O'Connor said he was not. 7 Tr. 89–90. In light of the affidavits, as well as the prosecutor's silence as to the existence of any promises, deals, or inducements, counsel did not pursue the issue of bias of either guard.

As it turns out, however, in May 1977, seven months prior to trial, O'Connor and Mitchell each had signed an agreement providing that ATF would pay them for information they provided. The form was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor," and provided that the Bureau would, "upon the accomplishment of the objective sought to be obtained . . . pay to said vendor a sum commensurate with services and information rendered." App. 22–23. It further invited the Bureau's special agent in charge of the investigation, Agent Prins, to recommend an amount to be paid after the information received had proved "worthy of compensation." Agent Prins had personally presented these forms to O'Connor and Mitchell for their signatures. The two witnesses signed the last of their affidavits, which declared the absence of any promise of reward, *the day after they signed the ATF forms.* After trial, Agent Prins requested that O'Connor and Mitchell each be paid $500, but the Bureau reduced these "rewards" to $300 each. App. to

Pet. for Cert. 14a. The District Court Judge concluded that "it appears probable to the Court that O'Connor and Mitchell did expect to receive from the United States some kind of compensation, over and above their expenses, for their assistance, though perhaps not for their testimony." *Id.*, at 7a.

Upon discovering these ATF forms through a Freedom of Information Act request, Bagley sought relief from his conviction. The District Court Judge denied Bagley's motion to vacate his sentence stating that because he was the same judge who had been the original trier of fact, he was able to determine the effect the contracts would have had on his decision, more than four years earlier, to convict Bagley. The judge stated that beyond a reasonable doubt the contracts, if disclosed, would have had no effect upon the convictions:

> "The Court has read in their entirety the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial . . . . Almost all of the testimony of both of those witnesses was devoted to the firearm charges in the indictment. The Court found the defendant not guilty of those charges. With respect to the charges against the defendant of distributing controlled substances and possessing controlled substances with the intention of distributing them, the testimony of O'Connor and Mitchell was relatively very brief. With respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies which had been prescribed for defendant's own use. As to that aspect of their testimony, the testimony of O'Connor and Mitchell tended to be favorable to the defendant." *Id.*, at 8a.

The foregoing statement, as to which the Court remands for further consideration, is seriously flawed on its face. First, the testimony that the court describes was in fact the *only inculpatory testimony in the case* as to the two counts for which Bagley received a sentence of imprisonment. If, as the judge claimed, the testimony of the two information "vendors" was "very brief" and in part favorable to the defendant, that fact shows the weakness of the prosecutor's case, not the harmlessness of the error. If the testimony that might have been impeached is weak and also cumulative, corroborative, or tangential, the failure to disclose the impeachment evidence could conceivably be held harmless. But when the testimony is the start and finish of the prosecution's case, and is weak nonetheless, quite a different conclusion must necessarily be drawn.

Second, the court's statement that Bagley did not attempt to discredit the witnesses' testimony, as if to suggest that impeachment evidence would not have been used by the defense, ignores the realities of trial preparation and strategy, and is factually erroneous as well. Initially, the Government's failure to disclose the existence of any inducements to its witnesses, coupled with its disclosure of affidavits stating that no promises had been made, would lead all but the most careless lawyer to step wide and clear of questions about promises or inducements. The combination of nondisclosure and disclosure would simply lead any reasonable attorney to believe that the witness could not be impeached on that basis. Thus, a firm avowal that no payment is being received in return for assistance and testimony, if offered at trial by a witness who is not even a Government employee, could be devastating to the defense. A wise attorney would, of necessity, seek an alternative defense strategy.

Moreover, counsel for Bagley in fact did attempt to discredit O'Connor, by asking him whether two ATF agents had pressured him or had threatened that his job might be in

jeopardy, in order to get him to cooperate. 7 Tr. 89–90. But when O'Connor answered in the negative, *ibid.*, counsel stopped this line of questioning. In addition, counsel for Bagley attempted to argue to the District Court, in his closing argument, that O'Connor and Mitchell had "fabricated" their accounts, 14 Tr. 1117, but the court rejected the proposition:

> "Let me say this to you. I would find it hard to believe really that their testimony was fabricated. I think they might have been mistaken. You know, it is possible that they were mistaken. *I really did not get the impression at all that either one or both of those men were trying at least in court here to make a case against the defendant.*" *Id.*, at 1117–1118. (Emphasis added.)

The District Court, in so saying, of course had seen no evidence to suggest that the two witnesses might have any motive for "mak[ing] a case" against Bagley. Yet, as JUSTICE BLACKMUN points out, the possibility of a reward, the size of which is directly related to the Government's success at trial, gave the two witnesses a "personal stake" in the conviction and an "incentive to testify falsely in order to secure a conviction." *Ante*, at 683.

Nor is this case unique. Whenever the Government fails, in response to a request, to disclose impeachment evidence relating to the credibility of its key witnesses, the truth-finding process of trial is necessarily thrown askew. The failure to disclose evidence affecting the overall credibility of witnesses corrupts the process to some degree in all instances, see *Giglio* v. *United States*, 405 U. S. 150 (1972); *Napue* v. *Illinois*, 360 U. S. 264 (1959); *United States* v. *Agurs*, 427 U. S. 97, 121 (1976) (MARSHALL, J., dissenting), but when "the 'reliability of a given witness may well be determinative of guilt or innocence,'" *Giglio*, *supra*, at 154 (quoting *Napue*, *supra*, at 269), and when "the Government's case depend[s] almost entirely on" the testimony of a certain witness, 405 U. S., at 154, evidence of that witness' possible

bias simply may not be said to be irrelevant, or its omission harmless. As THE CHIEF JUSTICE said in *Giglio* v. *United States*, in which the Court ordered a new trial in a case in which a promise to a key witness was not disclosed to the jury:

> "[W]ithout [Taliento's testimony] there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.
>
> "For these reasons, the due process requirements enunciated in *Napue* and other cases cited earlier require a new trial." *Id.*, at 154–155.

Here, too, witnesses O'Connor and Mitchell were crucial to the Government's case. Here, too, their personal credibility was potentially dispositive, particularly since the allegedly corroborating tape recordings were not audible. It simply cannot be denied that the existence of a contract signed by those witnesses, promising a reward whose size would depend "on the Government's satisfaction with the end result," *ante*, at 683, might sway the trier of fact, or cast doubt on the truth of all that the witnesses allege. In such a case, the trier of fact is absolutely entitled to know of the contract, and the defense counsel is absolutely entitled to develop his case with an awareness of it. Whatever the applicable standard of materiality, see *infra*, in this instance it undoubtedly is well met.

Indeed, *Giglio* essentially compels this result. The similarities between this case and that one are evident. In both cases, the triers of fact were left unaware of Government inducements to key witnesses. In both cases, the individual trial prosecutors acted in good faith when they failed to disclose the exculpatory evidence. See *Giglio*, *supra*, at 151–153; App. to Pet. for Cert. 13a (Magistrate's finding that

Bagley prosecutor would have disclosed information had he known of it). The sole difference between the two cases lies in the fact that in *Giglio*, the prosecutor affirmatively stated *to the trier of fact* that no promises had been made. Here, silence in response to a defense request took the place of an affirmative error at trial—although the prosecutor did make an affirmative misrepresentation to the defense in the affidavits. Thus, in each case, the trier of fact was left unaware of powerful reasons to question the credibility of the witnesses. "[T]he truth-seeking process is corrupted by the withholding of evidence favorable to the defense, regardless of whether the evidence is directly contradictory to evidence offered by the prosecution." *Agurs*, *supra*, at 120 (MARSHALL, J., dissenting). In this case, as in *Giglio*, a new trial is in order, and the Court of Appeals correctly reversed the District Court's denial of such relief.

II

Instead of affirming, the Court today chooses to reverse and remand the case for application of its newly stated standard to the facts of this case. While I believe that the evidence at issue here, which remained undisclosed despite a particular request, undoubtedly was material under the Court's standard, I also have serious doubts whether the Court's definition of the constitutional right at issue adequately takes account of the interests this Court sought to protect in its decision in *Brady* v. *Maryland*, 373 U. S. 83 (1963).

A

I begin from the fundamental premise, which hardly bears repeating, that "[t]he purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one." *Application of Kapatos*, 208 F. Supp. 883, 888 (SDNY 1962); see *Giles* v. *Maryland*, 386 U. S. 66, 98 (1967) (Fortas, J., concurring in judgment) ("The State's obligation is not to convict, but to see that, so far as possible, truth emerges"). When evidence favorable to the defendant is known to exist,

disclosure only enhances the quest for truth; it takes no direct toll on that inquiry. Moreover, the existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty. The private whys and wherefores of jury deliberations pose an impenetrable barrier to our ability to know just which piece of information might make, or might have made, a difference.

When the state does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and thereby undermines the reliability of the verdict. Unlike a situation in which exculpatory evidence exists but neither the defense nor the prosecutor has uncovered it, in this situation the state already has, resting in its files, material that would be of assistance to the defendant. With a minimum of effort, the state could improve the real and apparent fairness of the trial enormously, by assuring that the defendant may place before the trier of fact favorable evidence known to the government. This proposition is not new. We have long recognized that, within the limit of the state's ability to identify so-called exculpatory information, the state's concern for a fair verdict precludes it from withholding from the defense evidence favorable to the defendant's case in the prosecutor's files. See, *e. g.*, *Pyle* v. *Kansas*, 317 U. S. 213, 215–216 (1942) (allegation that imprisonment resulted from perjured testimony and deliberate suppression by authorities of evidence favorable to him "charge a deprivation of rights guaranteed by the Federal Constitution").[1]

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[1] As early as 1807, this Court made clear that prior to trial a defendant must have access to impeachment evidence in the Government's possession. Addressing defendant Aaron Burr's claim that he should have access to the letter of General Wilkinson, a key witness against Burr in his trial for treason, Chief Justice Marshall wrote:

"The application of that letter to the case is shown by the terms in which the communication was made. It is a statement of the conduct of the

This recognition no doubt stems in part from the frequently considerable imbalance in resources between most criminal defendants and most prosecutors' offices. Many, perhaps most, criminal defendants in the United States are represented by appointed counsel, who often are paid minimal wages and operate on shoestring budgets. In addition, unlike police, defense counsel generally is not present at the scene of the crime, or at the time of arrest, but instead comes into the case late. Moreover, unlike the government, defense counsel is not in the position to make deals with witnesses to gain evidence. Thus, an inexperienced, unskilled, or unaggressive attorney often is unable to amass the factual support necessary to a reasonable defense. When favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact, and the trier of fact is deprived of the ingredients necessary to a fair decision. This grim reality, of course, poses a direct challenge to the traditional model of the adversary criminal process,[2] and perhaps

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accused made by the person who is declared to be the essential witness against him. The order for producing this letter is opposed:

"First, because it is not material to the defense. It is a principle, universally acknowledged, that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the witness will say; for if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. Those former declarations, therefore, constitute a mass of testimony, which a party has a right to obtain by way of precaution, and the positive necessity of which can only be decided at the trial." *United States* v. *Burr*, 25 F. Cas. 30, 36 (No. 14,692d) (CC Va. 1807).

[2] See Fortas, The Fifth Amendment: Nemo Tenetur Prodere Seipsum, 25 Clev. B. A. J. 91, 98 (1954) ("The state and [the defendant] could meet, as the law contemplates, in adversary trial, as equals—strength against strength, resource against resource, argument against argument"); see also Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 Stan. L. Rev. 1133, 1142–1145 (1982) (discussing challenge *Brady* poses to traditional adversary model).

because this reality so directly questions the fairness of our longstanding processes, change has been cautious and halting. Thus, the Court has not gone the full road and expressly required that the state provide to the defendant access to the prosecutor's complete files, or investigators who will assure that the defendant has an opportunity to discover every existing piece of helpful evidence. But cf. *Ake* v. *Oklahoma*, 470 U. S. 68 (1985) (access to assistance of psychiatrist constitutionally required on proper showing of need). Instead, in acknowledgment of the fact that important interests are served when potentially favorable evidence is disclosed, the Court has fashioned a compromise, requiring that the prosecution identify and disclose to the defendant favorable material that it possesses. This requirement is but a small, albeit important, step toward equality of justice.[3]

B

Brady v. *Maryland*, 373 U. S. 83 (1963), of course, established this requirement of disclosure as a fundamental element of a fair trial by holding that a defendant was denied due process if he was not given access to favorable evidence that is material either to guilt or punishment. Since *Brady* was decided, this Court has struggled, in a series of decisions, to define how best to effectuate the right recognized. To my mind, the *Brady* decision, the reasoning that underlay it, and the fundamental interest in a fair trial, combine to give the criminal defendant the right to receive from the prosecutor, and the prosecutor the affirmative duty to turn

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[3] Indeed, this Court's recent decision stating a stringent standard for demonstrating ineffective assistance of counsel makes an effective *Brady* right even more crucial. Without a real guarantee of effective counsel, the relative abilities of the state and the defendant become even more skewed, and the need for a minimal guarantee of access to potentially favorable information becomes significantly greater. See *Strickland* v. *Washington*, 466 U. S. 668 (1984); *id.*, at 712–715 (MARSHALL, J., dissenting); Babcock, *supra*, at 1163–1174 (discussing the interplay between the right to *Brady* material and the right to effective assistance of counsel).

over to the defendant, *all* information known to the government that might reasonably be considered favorable to the defendant's case. Formulation of this right, and imposition of this duty, are "the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair." *Moore* v. *Illinois*, 408 U. S. 786, 809–810 (1972) (MARSHALL, J., concurring in part and dissenting in part). If that right is denied, or if that duty is shirked, however, I believe a reviewing court should not automatically reverse but instead should apply the harmless-error test the Court has developed for instances of error affecting constitutional rights. See *Chapman* v. *California*, 386 U. S. 18 (1967).

My view is based in significant part on the reality of criminal practice and on the consequently inadequate protection to the defendant that a different rule would offer. To implement *Brady*, courts must of course work within the confines of the criminal process. Our system of criminal justice is animated by two seemingly incompatible notions: the adversary model, and the state's primary concern with justice, not convictions. *Brady*, of course, reflects the latter goal of justice, and is in some ways at odds with the competing model of a sporting event. Our goal, then, must be to integrate the *Brady* right into the harsh, daily reality of this apparently discordant criminal process.

At the trial level, the duty of the state to effectuate *Brady* devolves into the duty of the prosecutor; the dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*. The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the

material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence, often in cases in which there is no doubt that the failure to disclose was a result of absolute good faith. Indeed, one need only think of the Fourth Amendment's requirement of a neutral intermediary, who tests the strength of the policeman-advocate's facts, to recognize the curious status *Brady* imposes on a prosecutor. One telling example, offered by Judge Newman when he was a United States Attorney, suffices:

> "I recently had occasion to discuss *[Brady]* at a PLI Conference in New York City before a large group of State prosecutors. . . . I put to them this case: You are prosecuting a bank robbery. You have talked to two or three of the tellers and one or two of the customers at the time of the robbery. They have all taken a look at your defendant in a line-up, and they have said, 'This is the man.' In the course of your investigation you also have found another customer who was in the bank that day, who viewed the suspect, and came back and said, 'This is *not* the man.'
>
> "The question I put to these prosecutors was, do you believe you should disclose to the defense the name of the witness who, when he viewed the suspect, said 'that is not the man'? In a room of prosecutors not quite as large as this group but almost as large, only two hands went up. There were only two prosecutors in that group who felt they should disclose or would disclose that information. Yet I was putting to them what I thought was the easiest case—the clearest case for disclosure of exculpatory information!" J. Newman, A Panel Discussion before the Judicial Conference of the Second Judicial Circuit (Sept. 8, 1967), reprinted in Discovery in Criminal Cases, 44 F. R. D. 481, 500–501 (1968) (hereafter Newman).

While familiarity with *Brady* no doubt has increased since 1967, the dual role that the prosecutor must play, and the very real pressures that role creates, have not changed.

The prosecutor surely greets the moment at which he must turn over *Brady* material with little enthusiasm. In perusing his files, he must make the often difficult decision as to whether evidence is favorable, and must decide on which side to err when faced with doubt. In his role as advocate, the answers are clear. In his role as representative of the state, the answers should be equally clear, and often to the contrary. Evidence that is of doubtful worth in the eyes of the prosecutor could be of inestimable value to the defense, and might make the difference to the trier of fact.

Once the prosecutor suspects that certain information might have favorable implications for the defense, either because it is potentially exculpatory or relevant to credibility, I see no reason why he should not be required to disclose it. After all, favorable evidence indisputably enhances the truth-seeking process at trial. And it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence. In addition, to require disclosure of all evidence that might reasonably be considered favorable to the defendant would have the precautionary effect of assuring that no information of potential consequence is mistakenly overlooked. By requiring full disclosure of favorable evidence in this way, courts could begin to assure that a possibly dispositive piece of information is not withheld from the trier of fact by a prosecutor who is torn between the two roles he must play. A clear rule of this kind, coupled with a presumption in favor of disclosure, also would facilitate the prosecutor's admittedly difficult task by removing a substantial amount of unguided discretion.

If a trial will thereby be more just, due process would seem to require such a rule absent a countervailing interest. I see little reason for the government to keep such information

from the defendant. Its interest in nondisclosure at the trial stage is at best slight: the government apparently seeks to avoid the administrative hassle of disclosure, and to prevent disclosure of inculpatory evidence that might result in witness intimidation and manufactured rebuttal evidence.[4] Neither of these concerns, however, counsels in favor of a rule of nondisclosure in close or ambiguous cases. To the contrary, a rule simplifying the disclosure decision by definition does not make that decision more complex. Nor does disclosure of favorable evidence inevitably lead to disclosure of inculpatory evidence, as might an open file policy, or to the anticipated wrongdoings of defendants and their lawyers, if indeed such fears are warranted. We have other mechanisms for disciplining unscrupulous defense counsel; hamstringing their clients need not be one of them. I simply do not find any state interest that warrants withholding from a presumptively innocent defendant, whose liberty is at stake in the proceeding, information that bears on his case and that might enable him to defend himself.

Under the foregoing analysis, the prosecutor's duty is quite straightforward: he must divulge all evidence that reasonably appears favorable to the defendant, erring on the side of disclosure.

C

The Court, however, offers a complex alternative. It defines the right not by reference to the possible usefulness of the particular evidence in preparing and presenting the case, but retrospectively, by reference to the likely effect the evidence will have on the outcome of the trial. Thus, the Court holds that due process does not require the prosecutor to turn over evidence unless the evidence is "material," and the

[4] See Newman, 44 F. R. D., at 499 (describing the "serious" problem of witness intimidation that arises from prosecutor's disclosure of witnesses). But see Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U. L. Q. 279, 289–290 (disputing a similar argument).

Court states that evidence is "material" "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Ante*, at 682. Although this looks like a post-trial standard of review, see, *e. g.*, *Strickland* v. *Washington*, 466 U. S. 668 (1984) (adopting this standard of review), it is not. Instead, the Court relies on this review standard to define the contours of the defendant's constitutional right to certain material prior to trial. By adhering to the view articulated in *United States* v. *Agurs*, 427 U. S. 97 (1976)—that there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial—the Court permits prosecutors to withhold with impunity large amounts of undeniably favorable evidence, and it imposes on prosecutors the burden to identify and disclose evidence pursuant to a pretrial standard that virtually defies definition.

The standard for disclosure that the Court articulates today enables prosecutors to avoid disclosing obviously exculpatory evidence while acting well within the bounds of their constitutional obligation. Numerous lower court cases provide examples of evidence that is undoubtedly favorable but not necessarily "material" under the Court's definition, and that consequently would not have to be disclosed to the defendant under the Court's view. See, *e. g.*, *United States* v. *Sperling*, 726 F. 2d 69, 71–72 (CA2 1984) (prior statement disclosing motive of key Government witness to testify), cert. denied, 467 U. S. 1243 (1984); *King* v. *Ponte*, 717 F. 2d 635 (CA1 1983) (prior inconsistent statements of Government witness); see also *United States* v. *Oxman*, 740 F. 2d 1298, 1311 (CA3 1984) (addressing "disturbing" prosecutorial tendency to withhold information because of later opportunity to argue, with the benefit of hindsight, that information was not "material"), cert. pending *sub nom. United States* v. *Pflaumer*, No. 84–1033. The result is to veer sharply away from the basic notion that the fairness of a trial increases

with the amount of existing favorable evidence to which the defendant has access, and to disavow the ideal of full disclosure.

The Court's definition poses other, serious problems. Besides legitimizing the nondisclosure of clearly favorable evidence, the standard set out by the Court also asks the prosecutor to predict what effect various pieces of evidence will have on the trial. He must evaluate his case and the case of the defendant—of which he presumably knows very little—and perform the impossible task of deciding whether a certain piece of information will have a significant impact on the trial, bearing in mind that a defendant will later shoulder the heavy burden of proving how it would have affected the outcome. At best, this standard places on the prosecutor a responsibility to speculate, at times without foundation, since the prosecutor will not normally know what strategy the defense will pursue or what evidence the defense will find useful. At worst, the standard invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive. One Court of Appeals has recently vented its frustration at these unfortunate consequences:

> "It seems clear that those tests [for materiality] have a tendency to encourage unilateral decision-making by prosecutors with respect to disclosure. . . . [T]he root of the problem is the prosecutor's tendency to adopt a retrospective view of materiality. Before trial, the prosecutor cannot know whether, after trial, particular evidence will prove to have been material. . . . Following their adversarial instincts, some prosecutors have determined unilaterally that evidence will not be material and, often in good faith, have disclosed it neither to defense counsel nor to the court. If and when the evidence emerges after trial, the prosecutor can always argue,

with the benefit of hindsight, that it was not material." *United States* v. *Oxman, supra,* at 1310.

The Court's standard also encourages the prosecutor to assume the role of the jury, and to decide whether certain evidence will make a difference. In our system of justice, that decision properly and wholly belongs to the jury. The prosecutor, convinced of the guilt of the defendant and of the truthfulness of his witnesses, may all too easily view as irrelevant or unpersuasive evidence that draws his own judgments into question. Accordingly he will decide the evidence need not be disclosed. But the ideally neutral trier of fact, who approaches the case from a wholly different perspective, is by the prosecutor's decision denied the opportunity to consider the evidence. The reviewing court, faced with a verdict of guilty, evidence to support that verdict, and pressures, again understandable, to finalize criminal judgments, is in little better position to review the withheld evidence than the prosecutor.

I simply cannot agree with the Court that the due process right to favorable evidence recognized in *Brady* was intended to become entangled in prosecutorial determinations of the likelihood that particular information would affect the outcome of trial. Almost a decade of lower court practice with *Agurs* convinces me that courts and prosecutors have come to pay "too much deference to the federal common law policy of discouraging discovery in criminal cases, and too little regard to due process of law for defendants." *United States* v. *Oxman, supra,* at 1310–1311. Apparently anxious to assure that reversals are handed out sparingly, the Court has defined a rigorous test of materiality. Eager to apply the "materiality" standard at the pretrial stage, as the Court permits them to do, prosecutors lose sight of the basic principles underlying the doctrine. I would return to the original theory and promise of *Brady* and reassert the duty of the prosecutor to disclose all evidence in his files that might reasonably be considered favorable to the defendant's case. No

prosecutor can know prior to trial whether such evidence *will* be of consequence at trial; the mere fact that it might be, however, suffices to mandate disclosure.[5]

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[5] *Brady* not only stated the rule that suppression by the prosecution of evidence favorable to the defendant "violates due process where the evidence is material either to guilt or to punishment," 373 U. S., at 87, but also observed that two decisions of the Court of Appeals for the Third Circuit "state the correct constitutional rule." *Id.*, at 86. Neither of those decisions limited the right only to evidence that is "material" within the meaning that the Court today articulates. Instead, they provide strong evidence that *Brady* might have used the word in its evidentiary sense, to mean, essentially, germane to the points at issue.

In *United States ex rel. Almeida* v. *Baldi*, 195 F. 2d 815 (CA3 1952), cert. denied, 345 U. S. 904 (1953), the appeals court granted a petition for habeas corpus in a case in which the State had withheld from the defendant evidence that might have mitigated his punishment. After describing the withheld evidence as "relevant" and "pertinent," 195 F. 2d, at 819, the court concluded: "We think that the conduct of the Commonwealth as outlined in the instant case is in conflict with our fundamental principles of liberty and justice. The suppression of evidence favorable to Almeida was a denial of due process." *Id.*, at 820. Similarly, in *United States ex rel. Thompson* v. *Dye*, 221 F. 2d 763, 765 (CA3), cert. denied, 350 U. S. 875 (1955), the District Court had denied a petition for habeas corpus after finding that certain evidence of defendant's drunkenness at the time of the offense in question was not "vital" to the defense and did not require disclosure. 123 F. Supp. 759, 762 (WD Pa. 1954). The Court of Appeals reversed, observing that whether or not the jury ultimately would credit the evidence at issue, the evidence was substantial and the State's failure to disclose it cannot "be held as a matter of law to be unimportant to the defense here." 221 F. 2d, at 767.

It is clear that the term "material" has an evidentiary meaning quite distinct from that which the Court attributes to it. Judge Weinstein, for example, defines as synonymous the words "ultimate fact," "operative fact," "material fact," and "consequential fact," each of which, he states, means "a 'fact that is of consequence to the determination of the action.'" 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶401[03], n. 1 (1982) (quoting Fed. Rule Evid. 401). Similarly, another treatise on evidence explains that there are two components to relevance—materiality and probative value. "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue,

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In so saying, I recognize that a failure to divulge favorable information should not result in reversal in all cases. It may be that a conviction should be affirmed on appeal despite the prosecutor's failure to disclose evidence that reasonably might have been deemed potentially favorable prior to trial. The state's interest in nondisclosure at trial is minimal, and should therefore yield to the readily apparent benefit that full disclosure would convey to the search for truth. After trial, however, the benefits of disclosure may at times be tempered by the state's legitimate desire to avoid retrial when error has been harmless. However, in making the determination of harmlessness, I would apply our normal constitutional error test and reverse unless it is clear beyond a reasonable doubt that the withheld evidence would not have affected the outcome of the trial. See *Chapman* v. *California*, 386 U. S. 18 (1967); see also *Agurs*, 427 U. S., at 119–120 (MARSHALL, J., dissenting).[6]

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the evidence is immaterial." E. Cleary, McCormick on Evidence § 185 (3d ed. 1984). "Probative value" addresses the tendency of the evidence to establish a "material" proposition. *Ibid.* See also 1 J. Wigmore, Evidence § 2 (P. Tillers rev. 1982). There is nothing in *Brady* to suggest that the Court intended anything other than a rule that favorable evidence need only relate to a proposition at issue in the case in order to merit disclosure.

Even if the Court did not use the term "material" simply to refer to favorable evidence that might be relevant, however, I still believe that due process requires that prosecutors have the duty to disclose all such evidence. The inherent difficulty in applying, prior to trial, a definition that relates to the outcome of the trial, and that is based on speculation and not knowledge, means that a considerable amount of potentially consequential material might slip through the Court's standard. Given the experience of the past decade with *Agurs*, and the practical problem that inevitably exists because the evidence must be disclosed prior to trial to be of any use, I can only conclude that all potentially favorable evidence must be disclosed. Of course, I agree with courts that have allowed exceptions to this rule on a showing of exigent circumstances based on security and law enforcement needs.

[6] In a case of deliberate prosecutorial misconduct, automatic reversal might well be proper. Certain kinds of constitutional error so infect the

Any rule other than automatic reversal, of course, dilutes the *Brady* right to some extent and offers the prosecutor an incentive not to turn over all information. In practical effect, it might be argued, there is little difference between the rule I propose—that a prosecutor must disclose all favorable evidence in his files, subject to harmless-error review—and the rule the Court adopts—that the prosecutor must disclose only the favorable information that might affect the outcome of the trial. According to this argument, if a constitutional right to all favorable evidence leads to reversal only when the withheld evidence might have affected the outcome of the trial, the result will be the same as with a constitutional right only to evidence that will affect the trial outcome. See Capra, Access to Exculpatory Evidence: Avoiding the *Agurs* Problems of Prosecutorial Discretion and Retrospective Review, 53 Ford. L. Rev. 391, 409–410, n. 117 (1984). For several reasons, however, I disagree. First, I have faith that a prosecutor would treat a rule requiring disclosure of all information of a certain kind differently from a rule requiring disclosure only of some of that information. Second, persistent or egregious failure to comply with the constitutional duty could lead to disciplinary actions by the courts. Third, the standard of harmlessness I adopt is more protective of the defendant than that chosen by the Court, placing the burden on the prosecutor, rather than the defendant, to prove the harmlessness of his actions. It would be a foolish prosecutor who gambled too glibly with that standard of review. And finally, it is unrealistic to ignore the fact that at the appellate stage the state has an interest in avoiding retrial where the error is harmless beyond a reasonable doubt. That interest counsels against requiring a new trial in every case.

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system of justice as to require reversal in all cases, such as discrimination in jury selection. See, *e. g.*, *Peters* v. *Kiff*, 407 U. S. 493 (1972). A deliberate effort of the prosecutor to undermine the search for truth clearly is in the category of offenses antithetical to our most basic vision of the role of the state in the criminal process.

Thus, while I believe that some review for harmlessness is in order, I disagree with the Court's standard, even were it merely a standard for review and not a definition of "materiality." First, I see no significant difference for truth-seeking purposes between the *Giglio* situation and this one; for the same reasons I believe the result must therefore be the same here as in *Giglio*, see *supra*, at 691–692, I also believe the standard for reversal should be the same. The defendant's entitlement to a new trial ought to be no different in the two cases, and the burden he faces on appeal should also be the same. *Giglio* remains the law for a class of cases, and I reaffirm my belief that the same standard applies to this case as well. See *Agurs*, *supra*, at 119–120 (MARSHALL, J., dissenting).

Second, only a strict appellate standard, which places on the prosecutor a burden to defend his decisions, will remove the incentive to gamble on a finding of harmlessness. Any lesser standard, and especially one in which the defendant bears the burden of proof, provides the prosecutor with ample room to withhold favorable evidence, and provides a reviewing court with a simple means to affirm whenever in its view the correct result was reached. This is especially true given the speculative nature of retrospective review:

> "The appellate court's review of 'what might have been' is extremely difficult in the context of an adversarial system. Evidence is not introduced in a vacuum; rather, it is built upon. The absence of certain evidence may thus affect the usefulness, and hence the use, of other evidence to which defense counsel does have access. Indeed, the absence of a piece of evidence may affect the entire trial strategy of defense counsel." Capra, *supra*, at 412.

As a consequence, the appellate court no less than the prosecutor must substitute its judgment for that of the trier of fact under an inherently slippery test. Given such factors as a reviewing court's natural inclination to affirm a judgment

that appears "correct" and that court's obvious inability to know what a jury ever will do, only a strict and narrow test that places the burden of proof on the prosecutor will begin to prevent affirmances in cases in which the withheld evidence might have had an impact.

Even under the most protective standard of review, however, courts must be careful to focus on the nature of the evidence that was not made available to the defendant and not simply on the quantity of the evidence against the defendant separate from the withheld evidence. Otherwise, as the Court today acknowledges, the reviewing court risks overlooking the fact that a failure to disclose has a direct effect on the entire course of trial.

Without doubt, defense counsel develops his trial strategy based on the available evidence. A missing piece of information may well preclude the attorney from pursuing a strategy that potentially would be effective. His client might consequently be convicted even though nondisclosed information might have offered an additional or alternative defense, if not pure exculpation. Under such circumstances, a reviewing court must be sure not to focus on the amount of evidence supporting the verdict to determine whether the trier of fact reasonably would reach the same conclusion. Instead, the court must decide whether the prosecution has shown beyond a reasonable doubt that the new evidence, if disclosed and developed by reasonably competent counsel, would not have affected the outcome of trial.[7]

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[7] For example, in *United States ex rel. Butler* v. *Maroney*, 319 F. 2d 622 (CA3 1963), the defendant was convicted of first-degree murder. Trial counsel based his defense on temporary insanity at the time of the murder. During trial, testimony suggested that the shooting might have been the accidental result of a struggle, but defense counsel did not develop that defense. It later turned out that an eyewitness to the shooting had given police a statement that the victim and Butler had struggled prior to the murder. If defense counsel had known before trial what the eyewitness had seen, he might have relied on an additional defense, and he might have emphasized the struggle. See Note, The Prosecutor's Constitutional

In this case, it is readily apparent that the undisclosed information would have had an impact on the defense presented at trial, and perhaps on the judgment. Counsel for Bagley argued to the trial judge that the Government's two key witnesses had fabricated their accounts of the drug distributions, but the trial judge rejected the argument for lack of any evidence of motive. See *supra*, at 690. These key witnesses, it turned out, were each to receive monetary rewards whose size was contingent on the usefulness of their assistance. These rewards "served only to strengthen any incentive to testify falsely in order to secure a conviction." *Ante*, at 683. To my mind, no more need be said; this non-

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Duty to Reveal Evidence to the Defendant, 74 Yale L. J. 136, 145 (1964). Unless the same information already was known to counsel before trial, the failure to disclose evidence of that kind simply cannot be harmless because reasonably competent counsel might have utilized it to yield a different outcome. No matter how overwhelming the evidence that Butler committed the murder, he had a right to go before a trier of fact and present his best available defense.

Similarly, in *Ashley* v. *Texas*, 319 F. 2d 80 (CA5), cert. denied, 375 U. S. 931 (1963), the defendant was sentenced to death for murder. The prosecutor disclosed to the defense a psychiatrist's report indicating that the defendant was sane, but he failed to disclose the reports of a psychiatrist and a psychologist indicating that the defendant was insane. The nondisclosed information did not relate to the trial defense of self-defense. But the failure to disclose the evidence clearly prevented defense counsel from developing the possibly dispositive defense that he might have developed through further psychiatric examinations and presentation at trial. The nondisclosed evidence obviously threw off the entire course of trial preparation, and a new trial was in order. In such a case, there simply is no need to consider—in light of the evidence that actually was presented and the quantity of evidence to support the verdict returned—the possible effect of the information on the particular jury that heard the case. Indeed, to make such an evaluation would be to substitute the reviewing court's judgment of the facts, including the previously undisclosed evidence, for that of the jury, and to do so without the benefit of competent counsel's development of the information.

See also Field, Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale, 125 U. Pa. L. Rev. 15 (1976) (discussing application of harmless-error test).

disclosure could not have been harmless. I would affirm the judgment of the Court of Appeals.

JUSTICE STEVENS, dissenting.

This case involves a straightforward application of the rule announced in *Brady* v. *Maryland*, 373 U. S. 83 (1963), a case involving nondisclosure of material evidence by the prosecution in response to a specific request from the defense. I agree that the Court of Appeals misdescribed that rule, see *ante*, at 674–678, but I respectfully dissent from the Court's unwarranted decision to rewrite the rule itself.

As the Court correctly notes at the outset of its opinion, *ante*, at 669, the holding in *Brady* was that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U. S., at 87. We noted in *United States* v. *Agurs*, 427 U. S. 97, 103 (1976), that the rule of *Brady* arguably might apply in three different situations involving the discovery, after trial, of evidence that had been known prior to trial to the prosecution but not to the defense. Our holding in *Agurs* was that the *Brady* rule applies in two of the situations, but not in the third.

The two situations in which the rule applies are those demonstrating the prosecution's knowing use of perjured testimony, exemplified by *Mooney* v. *Holohan*, 294 U. S. 103 (1935), and the prosecution's suppression of favorable evidence specifically requested by the defendant, exemplified by *Brady* itself. In both situations, the prosecution's deliberate nondisclosure constitutes constitutional error—the conviction must be set aside if the suppressed or perjured evidence was "material" and there was "any reasonable likelihood" that it "could have affected" the outcome of the trial. 427 U. S., at 103.[1] See *Brady*, *supra*, at 88 ("would tend to exculpate");

[1] I do not agree with the Court's reference to the "constitutional error, *if any*, in this case," see *ante*, at 678 (emphasis added), because I believe a violation of the *Brady* rule is by definition constitutional error. Cf. *United*

accord, *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 874 (1982) ("reasonable likelihood"); *Giglio* v. *United States*, 405 U. S. 150, 154 (1972) ("reasonable likelihood"); *Napue* v. *Illinois*, 360 U. S. 264, 272 (1959) ("may have had an effect on the outcome"). The combination of willful prosecutorial suppression of evidence and, "more importantly," the potential "corruption of the truth-seeking function of the trial process" requires that result. 427 U. S., at 104, 106.[2]

In *Brady*, the suppressed confession was *inadmissible* as to guilt and "could not have affected the outcome" on that issue. 427 U. S., at 106. However, the evidence "could have affected Brady's punishment," and was, therefore, "material on the latter issue but not on the former." *Ibid.* Material-

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States v. *Agurs*, 427 U. S., at 112 (rejecting rule making "every nondisclosure . . . automatic error" outside the *Brady* specific request or perjury contexts). As written, the *Brady* rule states that the Due Process Clause is violated when favorable evidence is not turned over "upon request" and "the evidence is material either to guilt or punishment." *Brady* v. *Maryland*, 373 U. S., at 87. As JUSTICE MARSHALL's explication of the record in this case demonstrates, *ante*, at 685–692, the suppressed evidence here was not only favorable to Bagley, but also unquestionably material to the issue of his guilt or innocence. The two witnesses who had signed the undisclosed "Contract[s] for Purchase of Information" were the only trial witnesses as to the two distribution counts on which Bagley was convicted. On cross-examination defense counsel attempted to undercut the witnesses' credibility, obviously a central issue, but had little factual basis for so doing. When defense counsel suggested a lack of credibility during final argument in the bench trial, the trial judge demurred, because "I really did not get the impression at all that either one or both of these men were trying at least in court here to make a case against the defendant." A finding that evidence showing that the witnesses in fact had a "direct, personal stake in respondent's conviction," *ante*, at 683, was nevertheless not "material" would be egregiously erroneous under any standard.

[2] "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . ." *Brady*, *supra*, at 87–88.

ity was thus used to describe admissible evidence that "could have affected" a dispositive issue in the trial.

The question in *Agurs* was whether the *Brady* rule should be *extended*, to cover a case in which there had been neither perjury nor a specific request—that is, whether the prosecution has some constitutional duty to search its files and disclose automatically, or in response to a general request, all evidence that "might have helped the defense, or might have affected the outcome." 427 U. S., at 110.[3] Such evidence would, of course, be covered by the *Brady* formulation if it were specifically requested. We noted in *Agurs*, however, that because there had been no specific defense request for the later-discovered evidence, there was no notice to the prosecution that the defense did not already have that evidence or that it considered the evidence to be of particular value. 427 U. S., at 106–107. Consequently, we stated that in the absence of a request the prosecution has a constitutional duty to volunteer only "obviously exculpatory . . . evidence." *Id.*, at 107. Because this constitutional duty to disclose is *different* from the duty described in *Brady*, it is not surprising that we developed a different standard of materiality in the *Agurs* context. Necessarily describing the "inevitably imprecise" standard in terms appropriate to post-trial review, we held that no constitutional violation occurs in the absence of a specific request unless "the omitted evidence creates a reasonable doubt that did not otherwise exist." *Id.*, at 108, 112.[4]

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[3] "[W]e conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request at all . . . .

"We now consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty." 427 U. S., at 107.

[4] "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only

What the Court ignores with regard to *Agurs* is that its analysis was restricted entirely to the general or no-request context.[5] The "standard of materiality" we fashioned for the purpose of determining whether a prosecutor's failure to *volunteer* exculpatory evidence amounted to constitutional error was and is unnecessary with regard to the two categories of prosecutorial suppression already covered by the *Brady* rule. The specific situation in *Agurs*, as well as the circumstances of *United States* v. *Valenzuela-Bernal*, 458 U. S. 858 (1982) and *Strickland* v. *Washington*, 466 U. S. 668 (1984), simply falls "outside the *Brady* context." *Ante*, at 681.

But the *Brady* rule itself unquestionably applies to this case, because the Government failed to disclose favorable evidence that was clearly responsive to the defendant's specific

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if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *Id.*, at 112 (footnote omitted).

We also held in *Agurs* that when no request for particular information is made, post-trial determination of whether a failure voluntarily to disclose exculpatory evidence amounts to constitutional error depends on the "character of the evidence, not the character of the prosecutor." *Id.*, at 110. Nevertheless, implicitly acknowledging the broad discretion that trial and appellate courts must have to ensure fairness in this area, we noted that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.*, at 108. Finally, we noted that the post-trial determination of reasonable doubt will vary even in the no-request context, depending on all the circumstances of each case. For example, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.*, at 113.

[5] See *ante*, at 678 ("Our starting point is the framework for evaluating the materiality of *Brady* evidence established in *United States* v. *Agurs*"); *ante*, at 681 (referring generally to "the *Agurs* standard for the materiality of undisclosed evidence"); *ante*, at 700 (MARSHALL, J., dissenting) (describing *Agurs* as stating a general rule that "there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial"). But see Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 Stan. L. Rev. 1133, 1148 (1982) (*Agurs* "distinguished" between no-request situations and the other two *Brady* contexts "where a pro-defense standard . . . would continue").

request. Bagley's conviction therefore must be set aside if the suppressed evidence was "material"—and it obviously was, see n. 1, *supra*—and if there is "any reasonable likelihood" that it could have affected the judgment of the trier of fact. Our choice, therefore, should be merely whether to affirm for the reasons stated in Part I of JUSTICE MARSHALL's dissent, or to remand to the Court of Appeals for further review under the standard stated in *Brady*. I would follow the latter course, not because I disagree with JUSTICE MARSHALL's analysis of the record, but because I do not believe this Court should perform the task of reviewing trial transcripts in the first instance. See *United States* v. *Hasting*, 461 U. S. 499, 516–517 (1983) (STEVENS, J., concurring in judgment). I am confident that the Court of Appeals would reach the appropriate result if it applied the proper standard.

The Court, however, today sets out a reformulation of the *Brady* rule in which I have no such confidence. Even though the prosecution suppressed evidence that was specifically requested, apparently the Court of Appeals may now reverse only if there is a "reasonable probability" that the suppressed evidence "would" have altered "the result of the [trial]." *Ante*, at 682, 684. According to the Court this single rule is "sufficiently flexible" to cover specific as well as general or no-request instances of nondisclosure, *ante*, at 682, because, at least in the view of JUSTICE BLACKMUN and JUSTICE O'CONNOR, a reviewing court can "consider directly" under this standard the more threatening effect that nondisclosure in response to a specific defense request will generally have on the truth-seeking function of the adversary process. *Ante*, at 683 (opinion of BLACKMUN, J.).[6]

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[6] I of course agree with JUSTICE BLACKMUN, *ante*, at 679–680, n. 9, and 684, and JUSTICE MARSHALL, *ante*, at 706, that our long line of precedents establishing the "reasonable likelihood" standard for use of perjured testimony remains intact. I also note that the Court plainly envisions that reversal of Bagley's conviction would be possible on remand even under the new standard formulated today for specific-request cases. See *ante*, at 684.

I cannot agree. The Court's approach stretches the concept of "materiality" beyond any recognizable scope, transforming it from merely an evidentiary concept as used in *Brady* and *Agurs*, which required that material evidence be admissible and probative of guilt or innocence in the context of a specific request, into a result-focused standard that seems to include an independent weight in favor of affirming convictions despite evidentiary suppression. Evidence favorable to an accused and relevant to the dispositive issue of guilt apparently may still be found not "material," and hence suppressible by prosecutors prior to trial, unless there is a reasonable probability that its use would result in an acquittal. JUSTICE MARSHALL rightly criticizes the incentives such a standard creates for prosecutors "to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive." *Ante*, at 701.

Moreover, the Court's analysis reduces the significance of deliberate prosecutorial suppression of potentially exculpatory evidence to that merely of one of numerous factors that "may" be considered by a reviewing court. *Ante*, at 683 (opinion of BLACKMUN, J.). This is not faithful to our statement in *Agurs* that "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 427 U. S., at 106. Such suppression is far more serious than mere nondisclosure of evidence in which the defense has expressed no particular interest. A reviewing court should attach great significance to silence in the face of a specific request, when responsive evidence is later shown to have been in the Government's possession. Such silence actively misleads in the same way as would an affirmative representation that exculpatory evidence does not exist when, in fact, it does (*i. e.*, perjury)—indeed, the two situations are aptly described as "sides of a single coin." Babcock, Fair Play: Evidence Favorable to

an Accused and Effective Assistance of Counsel, 34 Stan. L. Rev. 1133, 1151 (1982).

Accordingly, although the judgment of the Court of Appeals should be vacated and the case should be remanded for further proceedings, I disagree with the Court's statement of the correct standard to be applied. I therefore respectfully dissent from the judgment that the case be remanded for determination under the Court's new standard.

CARCHMAN, MERCER COUNTY PROSECUTOR *v.* NASH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-776. Argued April 22, 1985—Decided July 2, 1985*

Article III of the Interstate Agreement on Detainers (Agreement), a congressionally sanctioned interstate compact, establishes a procedure by which a prisoner incarcerated in one State (the sending State) may demand the speedy disposition of "any untried indictment, information or complaint" that is the basis of a detainer lodged against him by another State (the receiving State). If the prisoner makes such a demand, Art. III requires the authorities in the receiving State to bring him to trial within 180 days or the court must dismiss the indictment, information, or complaint, and the detainer will cease to be of any force or effect. Respondent was convicted on criminal charges in New Jersey Superior Court, which imposed prison sentences and a 2-year term of probation to follow imprisonment. Thereafter, while on probation, respondent was charged with criminal offenses in Pennsylvania and was convicted and sentenced to prison there. While he was awaiting trial in Pennsylvania, the New Jersey authorities notified the New Jersey Superior Court that he had violated his probation by committing offenses in Pennsylvania, and that court issued an arrest warrant, which was lodged as a detainer with the corrections officials in Pennsylvania. Although respondent requested New Jersey officials to make a final disposition of the probation-violation charge, that State failed to bring him to trial within 180 days. Respondent then brought a habeas corpus petition in Federal District Court seeking dismissal of the probation-violation charge on the basis of New Jersey's noncompliance with Art. III. The District Court stayed respondent's federal action pending exhaustion of state-court remedies. After the New Jersey courts denied respondent relief under the Agreement, revoked his probation, and resentenced him to a term of imprisonment, the District Court granted respondent's petition for a writ of habeas corpus. The Court of Appeals affirmed, holding that an outstanding probation-violation charge is an "untried indictment, information or complaint" within the meaning of Art. III.

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*Together with No. 84-835, *New Jersey Department of Corrections* v. *Nash*, also on certiorari to the same court.

Held: Article III does not apply to detainers based on probation-violation charges. Pp. 724–734.

(a) The language of the Agreement indicates that Art. III applies solely to detainers based on outstanding criminal charges. Article III by its terms applies to detainers based on an "indictment," "information," or "complaint." The most natural interpretation of these terms is that they refer to documents charging an individual with having committed a criminal offense. This interpretation is reinforced by the adjective "untried," by the requirement that the prisoner promptly be "brought to trial," and by the limitation that the receiving State obtains custody "only for the purpose of permitting prosecution" on the charges. A probation-violation charge does not accuse an individual with having committed a criminal offense in the sense of initiating a prosecution. Although such a charge might be based on the commission of a criminal offense, it does not result in the probationer's being "prosecuted" or "brought to trial" for that offense. Nor does it result in the probationer's being "prosecuted" or "brought to trial" on the offense for which he initially was sentenced to probation, since he already will have been tried and convicted of that offense. Accordingly, a detainer based on a probation-revocation charge does not come within the plain language of the Agreement. Pp. 724–726.

(b) The legislative history created by the Council of State Governments, the drafter of the Agreement, does not directly address the issue in this case and does not support the inference that the Council intended Art. III to apply to detainers based on probation-violation charges. And the congressional history indicates that Congress, which adopted the Agreement, considered it to apply only to detainers based on untried criminal charges. Pp. 726–729.

(c) The purposes of the Agreement, including the purpose of enabling prisoners to obtain prompt disposition of charges underlying detainers in order to protect them from the adverse consequences that detainers have on their treatment and rehabilitation, do not compel the conclusion that, contrary to the Agreement's plain language, Art. III was intended to apply to probation-violation detainers. Such purposes are significantly less directly advanced by application of Art. III to probation-violation detainers than by its application to criminal-charge detainers. Pp. 729–734.

739 F. 2d 878, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 734.

Philip S. Carchman, pro se, argued the cause for petitioners in both cases. With him on the brief for petitioner in No. 84–776 was *William J. Flanagan. Irwin I. Kimmelman,* Attorney General of New Jersey, *James J. Ciancia,* Assistant Attorney General, and *Catherine M. Brown,* Deputy Attorney General, filed a brief for petitioner in No. 84–835.

John Burke III argued the cause *pro hac vice* for respondent in both cases. With him on the brief was *Joseph H. Rodriguez.*†

JUSTICE BLACKMUN delivered the opinion of the Court.

Article III of the Interstate Agreement on Detainers gives a prisoner incarcerated in one State the right to demand the speedy disposition of "any untried indictment, information or

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†A brief for the State of Pennsylvania et al. as *amici curiae* urging reversal was filed by *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, *Francis R. Filipi* and *Andrew S. Gordon,* Senior Deputy Attorneys General, *Allen C. Warshaw,* Chief Deputy Attorney General, and by the Attorneys General of their respective States as follows: *Charles A. Graddick* of Alabama, *Norman C. Gorsuch* of Alaska, *Robert K. Corbin* of Arizona, *John Steven Clark* of Arkansas, *John K. Van de Kamp* of California, *Duane Woodard* of Colorado, *Charles M. Oberly* of Delaware, *Jim Smith* of Florida, *Michael J. Bowers* of Georgia, *Michael A. Lilly* of Hawaii, *Jim Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *David L. Armstrong* of Kentucky, *James Tierney* of Maine, *Francis X. Bellotti* of Massachusetts, *Hubert H. Humphrey III* of Minnesota, *William L. Webster* of Missouri, *A. Eugene Crump* of Nebraska, *Brian McKay* of Nevada, *Stephen E. Merrill* of New Hampshire, *Lacy H. Thornburg* of North Carolina, *Anthony Celebrezze* of Ohio, *Arlene Violet* of Rhode Island, *T. Travis Medlock* of South Carolina, *Mark V. Meierhenry* of South Dakota, *W. J. Michael Cody* of Tennessee, *Jim Mattox* of Texas, *Jeffrey Amestoy* of Vermont, *Gerald L. Baliles* of Virginia, *Kenneth O. Eikenberry* of Washington, *Charlie Brown* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Archie G. McClintock* of Wyoming.

Stephen A. Saltzburg filed a brief for the University of Virginia School of Law Post-Conviction Assistance Project as *amicus curiae* urging affirmance.

complaint" that is the basis of a detainer lodged against him by another State. These cases present the issue whether Art. III applies to detainers based on probation-violation charges.

I

The Interstate Agreement on Detainers (Agreement) is a compact among 48 States, the District of Columbia, Puerto Rico, the Virgin Islands, and the United States. The Agreement was drafted in 1956 by the Council of State Governments and was adopted in 1958 by the State of New Jersey, where it is now codified as N. J. Stat. Ann. §2A:159A–1 *et seq.* (West 1971). The Agreement is a congressionally sanctioned interstate compact within the Compact Clause, U. S. Const., Art. I, §10, cl. 3, and thus is a federal law subject to federal construction. *Cuyler* v. *Adams*, 449 U. S. 433, 438–442 (1981).

A detainer is a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent. See *id.*, at 436, n. 3 (citing and quoting H. R. Rep. No. 91–1018, p. 2 (1970), and S. Rep. No. 91–1356, p. 2 (1970)); *United States* v. *Mauro*, 436 U. S. 340, 359 (1978); *Moody* v. *Daggett*, 429 U. S. 78, 80–81, n. 2 (1976); Council of State Governments, Suggested State Legislation, Program for 1957, p. 74 (1956). Detainers generally are based on outstanding criminal charges, outstanding parole- or probation-violation charges, or additional sentences already imposed against the prisoner. See Dauber, Reforming the Detainer System: A Case Study, 7 Crim. L. Bull. 669, 676 (1971). See generally L. Abramson, Criminal Detainers (1979).

The Agreement is based on a legislative finding that "charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct

programs of prisoner treatment and rehabilitation." Art. I. As has been explained:

> "The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as trustyships, moderations of custody and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for parole; there is little hope for his release after an optimum period of training and treatment, when he is ready for return to society with an excellent possibility that he will not offend again. Instead, he often becomes embittered with continued institutionalization and the objective of the correctional system is defeated." Council of State Governments, Suggested State Legislation, Program for 1957, p. 74 (1956).

See also *Cuyler* v. *Adams*, 449 U. S., at 449; *United States* v. *Mauro*, 436 U. S., at 353, 356, 359–360. Accordingly, the purpose of the Agreement is "to encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints." Art. I.

To achieve this purpose, Art. III of the Agreement establishes a procedure by which a prisoner incarcerated in one party State (the sending State) may demand the speedy disposition of "any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner"[1] by another party State (the receiving State).

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[1] Article III(a) provides in pertinent part:

"Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the

Specifically, Art. III requires the warden to inform the prisoner that a detainer has been lodged against him and that he may request final disposition of the indictment, information, or complaint upon which the detainer is based. If the prisoner makes such a request, the warden must forward it, together with a certificate providing certain information about the prisoner's terms of confinement, to the appropriate prosecuting official and court of the receiving State. The authorities in the receiving State then must bring the prisoner to trial within 180 days, absent good cause shown, or the court must dismiss the indictment, information, or complaint with prejudice, and the detainer will cease to be of any force or effect.

II

On June 21, 1976, respondent Richard Nash, in the Superior Court of New Jersey, Law Division, Mercer County, pleaded guilty to charges of breaking and entering with intent to rape, and of assault with intent to rape. On October 29, the Superior Court sentenced respondent to 18 months in prison on each count, with the sentences to run consecutively. The court suspended two years of the sentences and imposed a 2-year term of probation to follow respondent's imprisonment. On June 13, 1978, while on probation, respondent was arrested in Montgomery County, Pa., and charged with burglary, involuntary deviate sexual intercourse, and loitering. Respondent was tried and convicted on the Pennsylvania charges on March 14, 1979, and was sentenced on July 13 of that year.

While respondent was awaiting trial in Pennsylvania, the Mercer County Probation Department, on June 21, 1978,

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prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

notified the Superior Court that respondent had violated his probation by committing offenses in Pennsylvania. At the Department's request, the Superior Court issued a bench warrant for respondent's arrest. The warrant was lodged as a detainer with the appropriate corrections officials in Pennsylvania.

Beginning on April 13, 1979, respondent sent a series of letters to New Jersey officials requesting final disposition of the probation-violation charge. The State of New Jersey failed to bring respondent "to trial" on the probation-violation charge within 180 days after Art. III was invoked.

On March 6, 1980, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania seeking dismissal of the probation-violation charge on the basis of the State's noncompliance with Art. III. The case was transferred, pursuant to 28 U. S. C. § 1406(a), to the United States District Court for the District of New Jersey. App. to Pet. for Cert. in No. 84–776, p. 101. That court stayed respondent's federal action pending exhaustion of state-court remedies. *Id.*, at 81.

Respondent then petitioned for a writ of habeas corpus in New Jersey Superior Court. The Superior Court denied respondent's motion to dismiss the probation-violation charge, ruled that respondent's Pennsylvania convictions constituted a probation violation, and ordered respondent to serve the two consecutive 18-month sentences on his New Jersey convictions, with credit for 249 days respondent had served in 1976 and 1977. The Appellate Division affirmed the trial court's judgment, *id.*, at 44, and the New Jersey Supreme Court denied certification. *Id.*, at 43.

Respondent then returned to the United States District Court for the District of New Jersey. On March 21, 1983, the District Court granted the petition for a writ of habeas corpus, vacated respondent's probation revocation, and or-

dered his release from state custody.[2] 558 F. Supp. 641 (1983). Petitioner Philip S. Carchman, the Mercer County prosecutor, took an appeal to the United States Court of Appeals for the Third Circuit. Petitioner State of New Jersey, Department of Corrections, at this point sought to intervene because the District Court's decision invalidated its policy that parole- and probation-violation detainers do not fall within Art. III of the Agreement. Its motion to intervene was granted by the Court of Appeals. App. to Pet. for Cert. in No. 84–776, p. 18.

The Court of Appeals affirmed, holding that an outstanding probation-violation charge is an "untried indictment, information or complaint" within the meaning of Art. III of the Agreement.[3] *Nash* v. *Jeffes*, 739 F. 2d 878 (1984). In reaching its decision, the Court of Appeals "decline[d] to adopt a technical interpretation of the relevant language of Article III," *id.*, at 883, and instead relied on "the broader purposes of the legislation." *Id.*, at 882. The court reasoned that a principal purpose of Art. III is to enable prison-

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[2]The District Court ruled that respondent's letters requesting disposition of the detainer were sufficient to invoke Art. III, even though they did not strictly comply with Art. III's request procedures. The Court of Appeals affirmed that ruling. We assume, without deciding, that this ruling on the issue whether respondent complied with the procedures of Art. III is correct.

[3]This holding conflicts with rulings of the United States Court of Appeals for the Ninth Circuit and of four state courts of last resort. See *United States* v. *Roach*, 745 F. 2d 1252 (CA9 1984); *Padilla* v. *State*, 279 Ark. 100, 648 S. W. 2d 797 (1983); *Suggs* v. *Hopper*, 234 Ga. 242, 215 S. E. 2d 246 (1975); *Clipper* v. *State*, 295 Md. 303, 455 A. 2d 973 (1983); *State* v. *Knowles*, 275 S. C. 312, 270 S. E. 2d 133 (1980). It also conflicts with rulings of several intermediate state appellate courts. See, *e. g.*, *People* v. *Jackson*, 626 P. 2d 723 (Colo. App. 1981); *People ex rel. Capalongo* v. *Howard*, 87 App. Div. 2d 242, 453 N. Y. S. 2d 45 (1982); *Blackwell* v. *State*, 546 S. W. 2d 828 (Tenn. Crim. App. 1976). See *Nash* v. *Jeffes*, 739 F. 2d 878, 881, n. 4 (CA3 1984) (citing cases involving parole- and probation-violation detainers).

ers to obtain prompt disposition of the charges underlying detainers in order to protect them from the adverse consequences that detainers have on their treatment and rehabilitation, and that this purpose would be furthered by applying Art. III to detainers based on probation-violation charges. The Court of Appeals completed its "policy analysis," *id.*, at 883, n. 9, by concluding that the benefit to prisoners of applying Art. III to probation-violation detainers would outweigh the administrative burdens, including additional paperwork and the cost of transporting prisoners in order to provide them with probation-revocation hearings.

In view of the conflict, see n. 3, *supra*, we granted certiorari. 469 U. S. 1157 (1985).

III

A

We begin by considering the language of the Agreement. Article III by its terms applies to detainers based on "any untried indictment, information or complaint." The most natural interpretation of the words "indictment," "information," and "complaint" is that they refer to documents charging an individual with having committed a criminal offense. See Fed. Rules Crim. Proc. 3 (complaint) and 7 (indictment and information). This interpretation is reinforced by the adjective "untried," which would seem to refer to matters that can be brought to full trial, and by Art. III's requirement that a prisoner who requests final disposition of the indictment, information, or complaint "shall be *brought to trial* within 180 days." (Emphasis added.)

The language of Art. V also indicates that Art. III should be interpreted to apply solely to criminal charges. Article V(a) provides: "In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information or complaint is pending

against such person in order that speedy and efficient *prosecution* may be had." (Emphasis added.) Article V(c) provides that "in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not *brought to trial* within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect." (Emphasis added.) Finally, Art. V(d) provides: "The temporary custody referred to in this agreement shall be only for the purpose of permitting *prosecution* on the charge or charges contained in 1 or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for *prosecution* on any other charge or charges arising out of the same transaction." (Emphasis added.)

The language of the Agreement therefore makes clear that the phrase "untried indictment, information or complaint" in Art. III refers to criminal charges pending against a prisoner. A probation-violation charge, which does not accuse an individual with having committed a criminal offense in the sense of initiating a prosecution, thus does not come within the terms of Art. III. Although the probation-violation charge might be based on the commission of a criminal offense, it does not result in the probationer's being "prosecuted" or "brought to trial" for that offense. Indeed, in the context of the Agreement, the probation-violation charge generally will be based on the criminal offense for which the probationer already was tried and convicted and is serving his sentence in the sending State.

Nor, of course, will the probationer be "prosecuted" or "brought to trial" on the criminal offense for which he initially was sentenced to probation, since he already will have been tried and convicted for that offense. Instead, the probation-violation charge results in a probation-revocation hearing, a

proceeding to determine whether the conditions of probation should be modified or the probationer should be resentenced, at which the probationer is entitled to less than the full panoply of due process rights accorded a defendant at a criminal trial. See *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973). Cf. *Morrissey* v. *Brewer*, 408 U. S. 471 (1972) (parole-revocation hearing).

Respondent contends that Art. III applies to more than just criminal charges, relying principally on the language of Art. I, which provides: "The party States find that *charges outstanding against a prisoner*, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." (Emphasis added.) According to respondent, this language indicates that the drafters intended the Agreement to apply, literally, to all "charges outstanding against a prisoner," including a probation-violation charge. However, when this language, which appears in the legislative declaration of purpose, is read in the context of the operative language of Arts. III and V discussed above, it is clear that the drafters meant the term "charges" to refer to criminal charges.[4]

We therefore conclude from the language of the Agreement that a detainer based on a probation-violation charge is not a detainer based on "any untried indictment, information or complaint," within the meaning of Art. III.

B

The legislative history of the Agreement does not persuade us to depart from what appears to be the plain language of the Agreement. Respondent relies principally on the follow-

[4] Even if the term "charges" in Art. I were interpreted to refer to all charges, under normal rules of statutory construction the specific language of Art. III would control over the general language of Art. I.

ing passage from comments made by the Council of State Governments, which drafted the Agreement:

> "A detainer may be defined as a warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer. Wardens of institutions holding men who have detainers on them invariably recognize these warrants and notify the authorities placing them of the impending release of the prisoner. Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or *a parolee commits a new crime and is imprisoned in another state;* or where a man not previously imprisoned commits a series of crimes in different jurisdictions." Suggested State Legislation, Program for 1957, p. 74 (emphasis added).

This passage is the introductory paragraph of the Council's discussion of the suggested legislation. It was intended to provide a general definition of detainers and a brief description of how they might arise. The italicized passage suggests that some detainers arise from parole-violation charges, a fact not in dispute here. By its terms, however, Art. III does not apply to all detainers, but only to those based on "any untried indictment, information or complaint."[5] The above passage does not illuminate, or purport to illuminate, the scope of this phrase.

Indeed, if the above passage were interpreted to define the scope of Art. III, it would lead to the conclusion that Art. III applies to *parole*-violation detainers. This conclusion is difficult to reconcile with the procedures established by the Agreement. In particular, the prisoner invokes Art. III by "caus[ing] to be delivered *to the prosecuting officer*

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[5] For example, Art. III clearly does not apply to a detainer based on an additional sentence already imposed against the prisoner.

and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint." (Emphasis added.) This notification mechanism is efficacious in the case of criminal-charge detainers, but not in the case of parole-violation detainers, because prosecutors and judges generally are not involved in parole-revocation proceedings. If the drafters of the Agreement had intended Art. III to apply to parole-violation detainers, they likely would have devised a more appropriate notification mechanism. Furthermore, Art. III(d) provides that if the prisoner is returned to the original place of imprisonment without being tried on any indictment, information, or complaint, "the *court* shall enter an order dismissing the [indictment, information, or complaint] with prejudice." Similarly, Art. V(c) provides that if the prisoner is not brought to trial within the period provided in Art. III, "*the appropriate court of the jurisdiction* where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice." (Emphasis added.) It is difficult to understand how these provisions would apply in the context of parole-violation charges, which generally are issued and adjudicated by a parole board or similar administrative agency, and are not "pending" in any court.

We therefore conclude that the reference to parolees in the comments of the Council of State Governments does not support the inference that in drafting the Agreement the Council intended the scope of Art. III to include detainers based on parole- or probation-violation charges.

In contrast to the legislative history created by the Council of State Governments, which does not directly address the precise issue in this case, the congressional legislative history indicates that Congress, which adopted the Agreement in 1970, see Pub. L. 91–538, 84 Stat. 1397, considered the Agreement to apply only to detainers based on untried crimi-

nal charges. The Court noted in *United States* v. *Mauro*, 436 U. S., at 359, and in *Cuyler* v. *Adams*, 449 U. S., at 436, n. 3, that the House and Senate Reports on the Agreement explain: "A detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending *criminal charges* in another jurisdiction." H. R. Rep. No. 91–1018, p. 2 (1970); S. Rep. No. 91–1356, p. 2 (1970) (emphasis added). The congressional Reports also contain references to the prisoner's being "convicted on the new charges." H. R. Rep. No. 91–1018, at 2; S. Rep. No. 91–1356, at 2. In addition, Senator Hruska stated in the congressional debates on the Agreement: "At the heart of this measure is the proposition that a person should be entitled to have *criminal charges* pending against him determined in expeditious fashion." 116 Cong. Rec. 38840 (1970) (emphasis added).

C

As noted, the Court of Appeals said its decision was based not on "a technical interpretation of the relevant language of Art. III," 739 F. 2d, at 883, nor on any statements in the legislative history addressing the specific issue in this case, but rather on "the broader purposes of the legislation," *id.*, at 882. We do not find that these purposes compel the conclusion that, contrary to the plain language of the Agreement, Art. III was intended to apply to probation-violation detainers.

Adoption of the Agreement was motivated in part by a practice of filing detainers based on untried criminal charges that had little basis.[6] These detainers often would be with-

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[6] One commentator has noted:

"Since the legal basis for a detainer is rarely examined, a prisoner can suffer loss of privileges and parole because of a charge for which there is not sufficient proof to obtain an indictment. Undoubtedly, detainers are sometimes used by prosecutors to exact punishment without having to try

drawn shortly before the prisoner was released.[7] Even though unsubstantiated, the detainers would have a detrimental effect on the prisoner's treatment.[8] Article III enables a prisoner to require the State lodging the detainer either to drop the charge and resulting detainer or to bring the prisoner to trial. In this way, the prisoner can clear his record of detainers based on unsubstantiated charges.

A probation-violation detainer, however, generally, as in the present case, will be based on the prisoner's commission of the crimes that resulted in his conviction and incarceration

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a charge which they feel would not result in a conviction." Note, Detainers and the Correctional Process, 1966 Wash. U. L. Q. 417, 423 (footnote omitted).

See also *United States* v. *Mauro*, 436 U. S. 340, 358, and n. 25 (1978) (noting that, because of the informality of the detainer system, detainers may be filed groundlessly or even in bad faith). The congressional Reports note that the Agreement provides the prisoner "with a procedure for bringing about a prompt test of the substantiality of detainers placed against him by other jurisdictions." H. R. Rep. No. 91–1018, p. 2 (1970); S. Rep. No. 91–1356, p. 2 (1970).

[7] According to the congressional Reports, "a majority of detainers filed by States are withdrawn near the conclusion of the Federal sentence." H. R. Rep. No. 91–1018, at 3; S. Rep. No. 91–1356, at 3.

[8] The United States Court of Appeals for the Eighth Circuit has described these effects as follows:

"[T]he inmate is (1) deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed; (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons (i. e., honor farms or forestry camp work); (4) ineligible for trustee *[sic]* status; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release programs or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions within the correctional system, which includes the removal of any possibility of transfer to an institution more appropriate for youthful offenders; (8) not entitled to preferred prison jobs which carry higher wages and entitle [him] to additional good time credits against [his] sentence; (9) inhibited by the denial of possibility of parole or any commutation of his sentence; (10) caused anxiety and thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities." *Cooper* v. *Lockhart*, 489 F. 2d 308, 314, n. 10 (1973).

in the sending State.[9] Because the convictions conclusively establish the probation violation, see *Morrissey* v. *Brewer*, 408 U. S., at 490 (parole revocation hearing), the probation-violation charge will not be unsubstantiated. Thus, the abuses that in part motivated adoption of the Agreement generally do not occur in the context of probation-violation detainers.

The Agreement generally seeks "to encourage the expeditious and orderly disposition of [outstanding] charges,"[10] as

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[9] See Brief for University of Virginia School of Law Post-Conviction Assistance Project as *Amicus Curiae* 30–31 ("[I]n most cases the conviction for which the prisoner is serving a sentence will be conclusive proof of the violation"). Although a probation-violation detainer initially might be based on an arrest, the probationer cannot invoke Art. III until he "has entered upon a term of imprisonment in a penal or correctional institution of a party State"—that is, until he has been convicted of the offense in the sending State and commenced to serve his sentence there.

[10] The Court of Appeals suggested that the Agreement serves "to vindicate a prisoner's constitutional right to a speedy trial," 739 F. 2d, at 883, but noted that this purpose is "not usually relevant when probation violations are involved." *Id.*, at 882. Some 13 years after the Agreement was drafted, this Court ruled that the Sixth Amendment right to a speedy trial entitles a prisoner in a federal penitentiary who is subject to pending state criminal charges to have the State, upon demand, make a diligent, good-faith effort to bring him to trial within a reasonable time. *Smith* v. *Hooey*, 393 U. S. 374 (1969). The congressional Reports discuss *Smith* v. *Hooey* and explain that enactment of the Agreement by Congress "would afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right." S. Rep. No. 91–1356, at 2. See also H. R. Rep. No. 91–1018, at 1–2; 116 Cong. Rec. 14000 (1970) (remarks of Rep. Poff); *id.*, at 38840 (remarks of Sen. Hruska). Thus, Congress, at least, enacted the Agreement in part to vindicate a prisoner's constitutional right to a speedy trial. This Court has never held, however, that a prisoner subject to a probation-violation detainer has a constitutional right to a speedy probation-revocation hearing. Cf. *Moody* v. *Daggett*, 429 U. S. 78 (1976) (a prisoner in a federal penitentiary who is subject to a federal parole-violation detainer is not constitutionally entitled to a prompt parole-revocation hearing). Thus, as the Court of Appeals suggested, it is not clear that the purpose of vindicating a prisoner's constitutional right to a speedy trial is applicable at all in the context of probation-violation detainers.

well as the prompt "determination of the proper status of any and all detainers based on untried indictments, informations or complaints," in order to eliminate "uncertainties which obstruct programs of prisoner treatment and rehabilitation." Art. I. The uncertainties associated with probation-violation detainers, however, are less severe than the uncertainties associated with criminal-charge detainers. See Dauber, Reforming the Detainer System: A Case Study, 7 Crim. L. Bull. 669, 680 (1971) (parole- and probation-violation detainers involve less uncertainty than criminal-charge detainers). As noted above, in general the factual issue of guilt of the probation violation is conclusively established by the convictions leading to incarceration in the sending State. Disposition of the probation-violation charge underlying a detainer therefore often will result in probation being revoked and in the probationer's being resentenced to imprisonment in the receiving State. See *Moody* v. *Daggett*, 429 U. S., at 89 (parole violation); L. Abramson, Criminal Detainers 64–65, 81 (1979). The ultimate consequence is that the detainer based on the probation-violation charge merely will be replaced by a detainer based on the reimposed sentence, with similar adverse effects on the prisoner's treatment and rehabilitation. See Dauber, *supra*, at 678–679. Since the probation revocation is based on commission of a crime serious enough to warrant incarceration in the sending State, the probationer no doubt often, as in the present case, will be sentenced to serve the full term of his suspended sentence. Thus, the uncertainties in the underlying charge, in the likelihood of the prisoner's receiving an additional sentence, and in the length of incarceration generally are less in the case of probation-violation detainers than in the case of criminal-charge detainers. Moreover, because the prisoner may not relitigate the factual issue of guilt of the probation-violation charge when it is established by a conviction in the sending State, see *Morrissey* v. *Brewer*, 408 U. S., at 490, the "most serious," see *Barker* v. *Wingo*, 407 U. S. 514, 532 (1972), of

the interests of the accused in obtaining a speedy disposition of outstanding criminal charges—the interest in "'limit[ing] the possibilities that long delay will impair [his] ability . . . to defend himself,'" *Smith* v. *Hooey*, 393 U. S. 374, 378 (1969), quoting *United States* v. *Ewell*, 383 U. S. 116, 120 (1966)—is unlikely to be strongly implicated in the probation-violation detainer context.

Indeed, it often may be desirable to delay rather than to expedite disposition of the probation-violation charge. As the Court explained in *Moody* v. *Daggett*, 429 U. S. 78 (1976), in the context of parole violations:

> "[I]n cases such as this, in which the parolee admits or has been convicted of an offense plainly constituting a parole violation, the only remaining inquiry is whether continued release is justified notwithstanding the violation. This is uniquely a 'prediction as to the ability of the individual to live in society without committing antisocial acts.' *Morrissey*, *supra*, at 480. In making this prophecy, a parolee's institutional record can be perhaps one of the most significant factors. Forcing decision immediately after imprisonment would not only deprive the parole authority of this vital information, but since the other most salient factor would be the parolee's recent convictions, . . . a decision to revoke parole would often be foreordained. Given the predictive nature of the hearing, it is appropriate that such hearing be held at the time at which prediction is both most relevant and most accurate—at the expiration of the parolee's intervening sentence." *Id.*, at 89.

Of course, the decision whether to request expeditious disposition lies with the prisoner, and there are circumstances under which the prisoner may have a legitimate interest in obtaining prompt disposition of a probation-violation charge underlying a detainer. For example, the prisoner may believe that he can present mitigating evidence that will lead to

a decision not to revoke probation. Alternatively, he may hope for the imposition of a concurrent sentence. Finally, he simply may prefer the certainty of a known sentence to the relative uncertainty of a pending probation-violation charge.

Nevertheless, as discussed above, the purposes of the Agreement are significantly less advanced by application of Art. III to probation-violation detainers than by application of Art. III to criminal-charge detainers. Whether those purposes would be advanced sufficiently by application of Art. III to probation-violation detainers to outweigh the administrative costs, and, more generally, whether the procedures of Art. III are the most appropriate means of disposing of probation-violation detainers,[11] are questions of legislative judgment that we must leave to the parties to the Agreement. Given the plain language of the Agreement and the relevant legislative history, we cannot conclude on the basis of the stated purposes of the Agreement alone that the parties to the Agreement intended Art. III to apply to probation-violation detainers. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

Must detainers based on outstanding charges of probation violation be disposed of within the terms of the Interstate Agreement on Detainers when such disposition is requested? Article III of the Agreement permits an inmate to invoke his rights to speedy detainer disposition by making a "request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged."

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[11] We note that some commentators have recommended, in light of the differences between probation-violation charges and criminal charges, that procedures different from those of Art. III be adopted for resolving probation-violation charges underlying detainers. See, *e. g.*, L. Abramson, Criminal Detainers 81–83 (1979); Dauber, Reforming the Detainer System: A Case Study, 7 Crim. L. Bull. 669, 704–705 (1971).

N. J. Stat. Ann. § 2A:159A–3 (West 1971) (hereinafter cited by Article only). No interpretive rule that I am aware of requires that "complaints" cannot subsume charges of probation violation, and no available legislative history indicates an intention to exclude detainers based on such charges from the Agreement. Instead, the drafters plainly intended a comprehensive solution for the problem of detainers, and the Court itself acknowledges that underlying purposes of the Agreement would be "advanced" if probation-violation detainers were subject to its strictures. *Ante*, at 733–734. Article IX of the Agreement directs that "[t]his Agreement shall be liberally construed so as to effectuate its purposes," and the Council of State Governments, original author of the Agreement some 30 years ago, still agrees.[1] Nevertheless, without mention of Article IX, the Court holds that the Agreement does not apply to probation-violation detainers. I respectfully suggest that, in so holding, the Court constructs an artificial "plain language" argument that assumes its conclusion, vitiates the Agreement in significant measure, and reverses the rationale of our other major precedent construing the Agreement, *United States* v. *Mauro*, 436 U. S. 340 (1978). Accordingly, I dissent.

I

Prior to expiration of his 2-year New Jersey probationary term, respondent Richard Nash was arrested in Pennsylvania. Upon learning of this, his probation department in New Jersey notified the New Jersey Superior Court of Nash's probable probation violation,[2] and the Superior Court

[1] "Since the [Agreement] is remedial in character, it should be construed liberally in favor of the prisoner." Council of State Governments, Handbook on Interstate Crime Control 134 (1978 ed.). See also *Cuyler* v. *Adams*, 449 U. S. 433, 449 (1981) ("The remedial purpose of the Agreement supports an interpretation that gives prisoners [a hearing] right").

[2] This notification took the form of a 1-page untitled memorandum from a probation officer to a Mercer County Superior Court judge, reciting that Nash had been arrested in Pennsylvania and that his "offenses [obviously

ordered that "a Bench Warrant be issued as a DETAINER." Supp. Record 3. This document was then lodged with corrections officials having custody of Nash in Pennsylvania.

The Pennsylvania officials, the New Jersey officials and courts, and Nash all treated the detainer as subject to the provisions of the Agreement. Upon its receipt, Pennsylvania notified Nash of his rights to dispose of the detainer under the Agreement. Nash then contacted New Jersey officials and requested disposition of the detainer under the Agreement, and the New Jersey officials attempted to comply with the Agreement's requirements. The New Jersey state courts reviewed Nash's case as one involving a "complaint" under Article III of the Agreement, see n. 2, *supra*, and the Federal District Court in New Jersey ruled that New Jersey's failure to comply with the time limits of the Agreement required dismissal of the New Jersey probation-violation charges. 558 F. Supp. 641, 651 (1983).

II

In *Mauro*, *supra*, we stated that when "the purposes of the Agreement and the reasons for its adoption" are implicated, there is simply "no reason to give an unduly restrictive

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as yet unproven] constitute a Violation of Probation." Supp. Record 6. The New Jersey Superior Court explicitly characterized this document as a "probation violation *complaint*." App. to Pet. for Cert. in No. 84-776, p. 55 (emphasis added). The Court ignores this characterization, as well as the question of what the result would be under its "plain language" analysis if any signatory States routinely so labeled charges of probation violation. I do not believe the argument should turn on such labels. See n. 16, *infra*.

Probationers in New Jersey are charged with knowledge that commission of further crimes while on probation is an automatic violation under New Jersey law. *State* v. *Zachowski*, 53 N. J. Super. 431, 437, 147 A. 2d 584, 588 (1959); cf. N. J. Stat. Ann., § 2C:45-3(a)(2) (West 1982) (warrant may be issued on probable cause that probationer "has committed another offense"). Whether or not the probation-violation complaint and consequent detainer had an adequate basis when issued in this case is not before us.

meaning" to the Agreement's terms. 436 U. S., at 361–362; accord, *Cuyler* v. *Adams*, 449 U. S. 443, 448–450 (1981) (looking to purposes of the Agreement in light of Article IX's "liberal construction" rule). It is therefore necessary to review the purposes underlying the Interstate Agreement on Detainers and how they relate to detainers based on charges of probation violation.

Three distinct goals generated the drafting and enactment of the Agreement: (1) definitive resolution of potential terms of incarceration so that prisoners and prison administrators can know with certainty when a prisoner is likely to be released, (2) speedy disposition of detainers to ensure that those filed for frivolous reasons do not linger, and (3) reciprocal ease for signatory States to obtain persons incarcerated in other jurisdictions for disposition of charges of wrongdoing, thereby superseding more cumbersome extradition procedures. See generally *Cuyler*, *supra*, at 446–450; *Mauro*, *supra*, at 359–364; Council of State Governments, Suggested State Legislation, Program for 1957, pp. 74–79 (1956) (hereinafter CSG Report). Noting that the Agreement was motivated "in part" by the second purpose—speedy disposition of detainers based on possibly unsubstantiated criminal charges—the Court places far too much emphasis on this purpose which is obviously the least relevant to detainers based on charges stemming from conviction for new criminal conduct.[3]

[3] Although the Court's conclusion apparently extends to detainers based on any type of probation-violation charge, its discussion refers only to probation violations founded on a new criminal conviction. Of course, probation-violation detainers may easily be based on arrests alone, as was the detainer in this case, or on charges of "technical" violations, the validity of which cannot be so easily presumed. See, *e. g.*, N. J. Stat. Ann., § 2C:45–1(b) (West 1982) (conditions of probation may include "meet-[ing] . . . family responsibilities," maintaining employment, continuing medical or psychiatric treatment, "pursu[ing] a prescribed . . . course of study," "refrain[ing] from frequenting unlawful or disreputable places or consorting with disreputable persons," etc.). Nevertheless, I am willing to concede, *arguendo*, that many probation-violation detainers are based

It is unarguable that a major motivating force behind the Agreement was the first listed above: disposition of unresolved detainers so as to produce sentences of determinate length, so that in-prison programming and rehabilitation could freely occur.[4] Because in-prison educational, vocational, rehabilitation, and other treatment programs are generally (1) overcrowded and (2) designed for inmates who will

upon criminal convictions in another jurisdiction. I will also assume that "'uncertainties'" concerning "the factual issue of guilt" are therefore "less severe" with regard to probation-violation than outstanding-criminal-charge detainers, *ante*, at 732, although the high rate of conviction for most criminal prosecutions suggests the differences are less real than the Court imagines. Both these assumptions are necessary for the Court to dismiss the second purpose of the Agreement as being "less advanced" in the probation-violation context. *Ante*, at 734.

The Court also employs its "factual issue of guilt" argument to dismiss the interest in obtaining speedy disposition of detainers so as not to impair a prisoner's possible defense, which it finds not as "strongly" implicated in the probation-violation context. *Ante*, at 732–733. Of course, this dismissal also depends on the dual assumptions that all probation-violation charges will be based on criminal convictions, and that they therefore carry greater inherent substantiation. Even if all these assumptions were true, however, the Court's conclusion still does not take proper account of the other goals of the Agreement.

[4] A detainer is defined by the drafters of the Agreement as any "warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer" after his current custody is terminated. CSG Report 74. Because detainers often go unresolved for years, "[t]he prison administrator is thwarted in his efforts toward rehabilitation. The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as trustyships, moderations of custody, and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for parole; there is little hope for his release after an optimum period of training and treatment . . . . Instead, he often becomes embittered . . . and the objective of the correctional system is defeated." *Ibid.* See Note, The Right to a Speedy Trial and the New Detainer Statutes, 18 Rutgers L. Rev. 828, 832 (1964) ("The thrust of [the Agreement] is not to protect the convict's right to a speedy trial per se, but rather to protect him from the particular disabilities engendered by an untried detainer pending against him").

shortly be released to the public world, prisoners that may be released only to another State's prisons are put at the end of the line for such programs. In addition, because prisoners facing longer sentences are believed to be greater escape risks, they are often held in stricter custody levels and denied various in-prison benefits (such as recreational and work-release programs and trusty status). In some States prisoners with detainers may even be denied parole that they would otherwise receive, on the theory that a prisoner cannot be "paroled into" another prison.[5] Thus *any* "charges outstanding" against prisoners that might result in additional incarceration create "uncertainties" that "obstruct programs of prisoner treatment and rehabilitation." Art. I.[6] This

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[5] The deleterious effects of detainers are well recognized and recitation of authority is superfluous. A helpful summary may be found in Wexler & Hershey, Criminal Detainers in a Nutshell, 7 Crim. L. Bull. 753 (1971): "As has been carefully documented elsewhere, a prison inmate with a detainer filed against him . . . may suffer several disabilities, ranging from mandatory maximum-security classification to exclusion from vocational rehabilitation programs and even to possible ineligibility for parole." See also N. Cohen & J. Gobert, The Law of Probation and Parole § 12.01, pp. 562–563 (1983); L. Abramson, Criminal Detainers 29–34, 85–87 (1979); Bennett, "The Last Full Ounce," 23 Fed. Prob. 20 (June 1959); 9 Fed. Prob. 1 (July–Sept. 1945) (entire issue devoted to "the detainer and its evils").

[6] The Court seriously misunderstands what "uncertainties" the Agreement is designed to resolve. It is an uncertain *length of incarceration*, not an uncertain basis for charges, that is "produced" by a detainer and "obstructs" rehabilitation. Cf. *ante*, at 732 (discussing only uncertainties related to the "factual issue of guilt"). Prison officials generally do not inquire whether the basis for a detainer is certain or flimsy—if it suggests a possibility of additional incarceration, whether for violation of parole or for conviction of a new crime, it is considered as an additional factor in determining the inmate's security level and programming options. See, *e. g.*, Dept. of Justice, Federal Prison System, Program Statement No. 5100.2, §§ 9(B)(1), 11(A)(1) (1982). The Agreement obviously does not eliminate detainers, but merely provides the means for definitive resolution and imposition of a certain, final sentence. "The result is to permit the prisoner to secure a greater degree of certainty as to his future and to enable the prison authorities to plan more effectively for his rehabilitation and return to society." S. Rep. No. 91–1356, p. 2 (1970).

statement in Article I represents the legislative findings of 48 States and Congress. It is, therefore, those legislative bodies, and not merely the prisoner, who "prefer the certainty of a known sentence to the relative uncertainty of a pending probation-violation charge." *Ante*, at 734.

Even if a detainer is withdrawn near the end of a prisoner's term, he will have been denied the benefits of less strict custody and will be released to the streets without the education, job training, or treatment he might otherwise have received. It is therefore undisputed that prisoners with unresolved detainers are embittered not only because those detainers may have little basis in fact, but also because they have a palpably punitive effect on the prisoner's life while in prison and on his rehabilitative future following release.[7]

Prosecutors know full well that a detainer can operate to deny prisoners substantial in-prison benefits and programs, as well as delay their eventual release. Thus, as the Court acknowledges, detainers are often filed with "little basis" in order to "'exact punishment'" impermissibly, and are often "withdrawn shortly before" release of the prisoner after the damage has been done. *Ante*, at 729–730, n. 6.[8] The evident lawlessness of such practices as well as their disruptive effect on rehabilitation motivated adoption of the Agreement, *ibid.*,

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[7] "It is in their effect upon the prisoner and our attempts to rehabilitate him that detainers are most corrosive." *Smith* v. *Hooey*, 393 U. S. 374, 379 (1969) (citation and stylistic punctuation omitted).

[8] As Congress noted when it joined the Agreement: "[W]ithdrawal at this late stage is of dubious benefit. The damage to the rehabilitative process has been done because by then the period of treatment and training has ended. Further, this situation precludes the institutional staff from developing a well-planned program upon release." S. Rep. No. 91–1356, *supra*, at 5. See also Bennett, The Correctional Administrator Views Detainers, 9 Fed. Prob. 8, 9 (July–Sept. 1945) ("It is . . . pointless to spend funds for the training of an inmate if he is merely to be graduated to another institution"); Heyns, The Detainer in a State Correctional System, 9 Fed. Prob. 13 (July–Sept. 1945) ("[N]o State correctional agency can plan a sound program of rehabilitation for an inmate so long as he must keep answering detainers").

in order, in large part, to end uncertainty regarding release dates. See Council of State Governments, Handbook on Interstate Crime Control 116 (1978 ed.) (the Agreement is designed "to permit the prisoner to secure a greater degree of knowledge of his own future and to make it possible for the prison authorities to provide better plans and programs for his treatment").

Obviously, a detainer based on a charge of probation violation implicates these rehabilitative concerns of the Agreement to the same extent as do detainers based on outstanding criminal charges. Accord, N. Cohen & J. Gobert, The Law of Probation and Parole § 12.02, p. 566 (1983) ("[T]he policies underlying [the Agreement] apply equally well to prisoners subject to a detainer based on a probation or parole violator warrant"). Both types of detainers may result in terms of additional incarceration, yet both types can also result in no additional time. Just as judges normally are permitted to impose an original sentence of brief or no incarceration, they also have broad discretion when resentencing for probation violations as to any subsequent term of imprisonment.[9]

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[9] New Jersey's laws are typical. Upon finding a probation violation, the court "may impose on the defendant any sentence that might have been imposed originally for the offense for which he was convicted." N. J. Stat. Ann., § 2C:45–3(b) (West 1982). Any sentence imposed may be ordered to run concurrently with or consecutively to any sentence the inmate is serving. § 2C:44–5 (West Supp. 1984–1985). Even revocation is not automatic despite a proven violation. § 2C:45–3(a)(4) (court "may" revoke probation upon finding a violation). Similar guidelines apply to parole-violation resentencing. See N. J. Stat. Ann. §§ 30:4–123.60–123.65 (West 1982). See also The National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standard 5.4(5) (1973) (upon revocation of parole for new criminal conviction, resentencing decisions should be governed by the same "criteria and procedures [that] gover[n] initial sentencing decisions"); see generally Cohen & Gobert, The Law of Probation and Parole § 15; *id.*, p. 646 ("Most jurisdictions" provide judges with "a vast array of possible sanctions to impose after a revocation").

In light of such broad grants of discretion, the Court's assertion, offered with no citation of supportive authority, that "probationer[s] no doubt

Thus certainty regarding the "factual issue of guilt" of the charge, *ante*, at 732, is irrelevant to the uncertainty of the incarceration term. For this reason, the first listed purpose of the Agreement, certainty regarding length of incarceration, is "fully implicated," *Mauro*, 436 U. S., at 362, by detainers based on charges of probation violation, and "the very problems with which the Agreement is concerned," *ibid.*, are present.

The result of such analysis in *Mauro* is instructive. In that case we concluded that the phrase "written request for temporary custody" in Article IV was sufficiently broad to accommodate a writ of habeas corpus *ad prosequendum* from the Federal Government to a State, even though such a writ is (as the dissent noted) in effect a command which state officials have no discretion to ignore. *Id.*, at 361–364; see *id.*, at 366 (REHNQUIST, J., dissenting). We rejected just the sort of semantic formalism practiced by the Court today, which virtually echoes the *Mauro* dissent.[10] A "narrow reading" of the term "request" was inappropriate because nothing in the Agreement's history required it, and "[a]ny other reading of this section would allow the Government to gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action." *Id.*, at 364 (footnotes omitted).

Mauro's rationale does not require that the terms of the Agreement be thrown to the winds whenever an inmate

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often . . . will be sentenced to serve the full term of [their] suspended sentence[s]," *ante*, at 732, is surprising as well as speculative.

[10] In *Mauro*, JUSTICE REHNQUIST criticized the Court for basing its decision on the purposes of the Agreement, and suggested instead that the Court should have "*first* turn[ed] to the language of the [Agreement] before resorting to such extra-statutory interpretive aids." 436 U. S., at 366 (dissenting) (emphasis in original). Cf. *ante*, at 733–734 (although purposes of the Agreement would be "advanced" by application to probation-violation detainers, in light of the "plain language" of the Agreement "we cannot conclude on the basis of the stated purposes . . . alone" that such a result is required).

comes up with a plausible policy argument for the Agreement's application—obviously the Agreement cannot be judicially rewritten if its present language cannot accommodate probation-violation detainers. But, as we also noted in *Cuyler*, 449 U. S., at 449–450, consideration of the "purpose, . . . structure, . . . language, and its legislative history" is necessary before reaching a final interpretation of the Agreement's terms. *Mauro* plainly counsels against miserly interpretation of the words when the purposes of the Agreement are implicated, as they undeniably are here.[11] These precedents and the Agreement's purposes must be kept in mind as one turns to the Court's argument that the Agreement's "plain language" cannot accommodate detainers based on charges of probation violation.

III

Literally applied, the "plain language" of the Agreement, *ante*, at 726, 734, would place far more restrictions on the Agreement's operation than the Court admits. For example, Article III states that a prisoner who makes a final disposition request "shall be brought to trial within 180 days," and provides that "[i]f trial is not had . . . prior to the return of the prisoner . . . the court shall enter an order dismissing" the

[11] "When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such construction as will carry into execution the will of the Legislature . . . .' *Brown* v. *Duchesne*, 19 How. 183, 194 (1857)." *Kokoszka* v. *Belford*, 417 U. S. 642, 650 (1974). See also 2A C. Sands, Sutherland on Statutory Construction § 46.07 (4th ed. 1984) ("The literal interpretation of the words of an act should not prevail if it creates a result contrary to the intention of the legislature"). Even if this were not already a "well-established canon of statutory construction," *Bob Jones University* v. *United States*, 461 U. S. 574, 586 (1983), in this case the law itself directs us to apply its terms "liberally . . . so as to effectuate its purposes." Art. IX.

underlying charges. Obviously, however, neither the Court nor common sense would require that a prisoner returned on a detainer and convicted on a plea of guilty or diverted into a pretrial probation plan could obtain an Article III dismissal because he had had no "trial."[12] The term "trial" is plainly used in the Agreement to represent the broader concept of "final disposition"—indeed, Article III uses the terms interchangeably. See also *ante*, at 733 (noting interest in obtaining "speedy *disposition* of outstanding criminal charges") (emphasis added).

Similarly, the terms "indictment, information or complaint," strictly construed, would not encompass the varied types of documents used by some signatory States to initiate the criminal process. Virginia, for example, has a practice whereby criminal charges may be lodged with the court by a grand jury without involvement of a prosecutor. Va. Code § 19.2–216 (1983). The resulting document is called a "presentment" and, as petitioners admitted at oral argument, a "presentment" would not fall within their "plain language" interpretation of the Agreement. Tr. of Oral Arg. 10; see Brief for University of Virginia School of Law Post-Conviction Assistance Project as *Amicus Curiae* 13–14. Yet detainers based on presentments are, for purposes of the Agreement, no different from those based on indictments or informations. The Court therefore properly rejects *this* "plain language" argument, "interpret[ing]" the phrase "indictment, information or complaint" to encompass all "documents charging an individual with having committed a criminal offense." *Ante*, at 724.

Once the Court recognizes, albeit silently, the propriety of such interpretive efforts, its continued reliance on a strict "plain language" argument cannot persuade. Nash's argu-

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[12] Thus, just as a probation-violation charge "does not result in the probationer's being . . . 'brought to trial,'" *ante*, at 725, neither necessarily does an outstanding criminal charge.

ment is that the Agreement was designed to deal comprehensively with the problems caused by detainers of all kinds, and that "complaint" is a general term used to encompass any type of "charges outstanding against a prisoner," Art. I, that might form the basis for a detainer. No rule of language precludes such a conclusion. In general usage, "complaint" is defined as, *inter alia*, any "utterance expressing a grievance." Webster's New International Unabridged Dictionary 546 (2d ed. 1957). Even if restricted to its legal usage, "complaint" has been, since at least 1949 when the Federal Rules were amended, a sweeping generic term, applicable in both civil and criminal proceedings and encompassing "every action" that possibly can be filed in federal court, thereby superseding all "technical forms of pleading." Fed. Rules Civ. Proc. 1, 3, and 8(e)(1); Fed. Rule Crim. Proc. 3. Nothing in the Agreement or its legislative history indicates that "complaint" was used to *exclude* any particular type of detainer, or that its meaning was intended to be determined by its usage in only one context. Yet the Court looks only to the Federal Rules of Criminal Procedure for its definition of "complaint." *Ante*, at 724. Neither does any rule of statutory construction require the conclusion that "complaint" as used in Article III must be a more specific term than "charges" as used in Article I; indeed, one would think that construing the Agreement as a whole would require that these terms be read as coextensive rather than conflicting. But cf. *ante*, at 726, n. 4. Ultimately, no more than the fiat of a majority determines that "complaint" cannot include a probation-violation charge.

IV

While I believe that the Court loses the semantic battle in these cases, I am much more seriously troubled by the Court's blind eye to relevant legislative history and the purposes of the Agreement, and the consequent vitiation of the Agreement itself. Detainers based on outstanding charges of criminal acts likely constitute only between one-half and

two-thirds of all detainers filed in our Nation's prisons.[13] The drafters of a uniform interstate statute would surely be surprised and disappointed to learn that their efforts had succeeded in dealing with perhaps only one-half of the problem they addressed.[14]

In fact, all the available evidence suggests that the Agreement was designed to "deal comprehensively" with the problem of detainers of all kinds;[15] significantly, the Court can

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[13] The only reported statistical studies report that 46% and 44% of the detainers, respectively, in their concededly small samples were based on outstanding criminal charges. Dauber, Reforming the Detainer System: A Case Study, 7 Crim. L. Bull. 669, 676 (1971); Heyns, The Detainer in a State Correctional System, 9 Fed. Prob., at 15, n. 1. Detainers based on charges of probation or parole violation, on the other hand, made up, respectively, 19% and 44% of the samples. *Ibid.* See also Yackle, Taking Stock of Detainer Statutes, 8 Loyola (LA) L. Rev. 88, 89 (1975) (citing unpublished survey claiming that 69% of all detainers filed nationwide were based on outstanding criminal charges). The absence of comprehensive, recent data permits only rough generalizations, but it is certainly safe to say that restriction of the Agreement to only those detainers based on outstanding criminal charges leaves a substantial number of detainers beyond the protection of the Agreement. See Brief for Attorney General of Pennsylvania et al. as *Amici Curiae* 6, n. 4 (surmising that probation-violation detainers make up a "significant number" of all detainers).

[14] They might also be dismayed to discover that their third purpose—easing the administrative burdens of interstate prisoner transfer for signatory States—also stands partially frustrated by the Court's decision today. Once authorities have filed a detainer against a prisoner, Article IV of the Agreement enables them to obtain custody of that prisoner from another jurisdiction simply by filing a "written request for temporary custody." Article IV, however, also uses the phrase "indictment, information or complaint" to trigger its provisions. Thus any State that now desires to resolve probation-violation detainers in a timely manner will no longer have the option of using the Agreement, and will have to resort to the same unsatisfactory extradition procedures that originally motivated the States to draft and join the Agreement.

[15] Yackle, *supra*, at 94; see also L. Abramson, Criminal Detainers, at 94 ("[A]rticle I . . . declares that the IAD applies to all situations in which an inmate faces pending charges in another jurisdiction"). The title of the Agreement itself belies the Court's attribution of a less-than-

point to absolutely no affirmative indication that the drafters of the Agreement intended to exclude probation-violation detainers from its terms. As the Court acknowledges, Article I of the Agreement contains a "legislative declaration of purpose," *ante*, at 726, to reach "charges outstanding against a person," that is, "any and all detainers." The Court concedes the comprehensive scope of Article I, but sidesteps it by declaring that Article III "*does not apply to all detainers*, but only those based on 'any untried indictment, information or complaint.'" *Ante*, at 727 (emphasis added). The italicized phrase, however, merely assumes the conclusion. If the drafters of the Agreement did in fact intend to reach all detainers, as the evidence suggests, nothing in the general language of Article III requires a more restrictive reading.[16]

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comprehensive legislative intent—we are not construing an Interstate Agreement on "Some" Detainers.

[16] The Court attempts to buttress its position by relying on two examples not presented in these cases. First, the Court recognizes that a comprehensive reading might require application of the Agreement to *parole*-violation detainers as well. Because Article III refers to "prosecuting officers" and "courts," and "because prosecutors and judges are generally not involved in parole revocation proceedings," language other than that currently found in Article III would have been, in the Court's view, "more appropriate" for this application. *Ante*, at 727–728. Of course, courts and prosecuting officers from probation departments *are* involved in probation-revocation proceedings, the only type of proceeding at issue here, so that these terms of Article III are perfectly well fulfilled in this case. More importantly, however, there is simply no reason that the terms of Article III could not accommodate disposition of parole-violation detainers, if they were applied a little less woodenly than the Court reads them. Just as "trial" in Article III must be interpreted as coextensive with the concept of "final disposition," so the other terms of Article III must be read "liberally," Art. IX, to accommodate the analogous roles that parole boards and probation officers play in the correctional system. Indeed, the New Jersey probation office, prosecutors, and courts in these cases made no objection to complying with the terms of Article III to dispose of Nash's probation-violation detainer.

The Court's second makeweight argument is that Article III "clearly does not apply to a detainer based on an additional sentence already im-

Although the terms of the Agreement were finally drafted in 1956 by the Council of State Governments, they were founded on a "statement of aims or guiding principles" drawn up in 1948. See CSG Report 74–75.[17] Those principles discuss "detainers" generally, without reference to their underlying basis, and the CSG Report declared in 1956 that those principles still "should govern the actions of prosecuting authorities, sentencing judges, prison officials *and parole authorities* to the end that detainers will not hamper the administration of correction programs and the effective rehabilitation of criminals." *Id.*, at 75 (emphasis added). Not even a suspicion that a third or more of all detainers might survive unaffected to "hamper" the correctional system is present here. Indeed, Principle III explicitly directs attention to detainers filed by nonprosecuting officials and thus not based on new criminal charges: "Prison and Parole authorities should take prompt action to settle detainers which have been filed *by them*." *Ibid.* (emphasis added).

After reprinting these "govern[ing]" principles, the CSG Report went on to introduce three legislative proposals to "dea[l] with disposition of detainers," *id.*, at 76, including its Agreement on Detainers for application in the "interstate field." *Id.*, at 78. The CSG offered a statement of purpose for this particular proposal "by which a prisoner may initiate proceedings to clear a detainer placed against him from another jurisdiction," again without qualification: "The Agreement on Detainers makes the clearing of detainers possible." *Ibid.*

To my mind, it requires an impossible effort to imagine that the authors of these broad principles and unqualified

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posed against the prisoner." *Ante*, at 727, n. 5. Of course it does not, but that is because such a detainer is *certain* and in no sense undisposed of or "untried."

[17] Significantly, the 1948 drafters included representatives from the Parole and Probation Compact Administrators Association. CSG Report 74.

statements of purpose, repeatedly referring to "parole" and relying on parole experts, somehow intended a less-than-comprehensive answer to the "problems in the detainer field." *Ibid.* Rather than attempt that effort, the Court simply ignores all this historical evidence of broad purpose. Presenting a single reference to parole-violation detainers as though it were the only such reference and then dismissing it as merely a "general definition," *ante*, at 726–727, the Court quickly retreats to its conclusion-assuming "plain language" argument. *Ibid.* At no point does the Court attempt to explain what rational intent might have motivated the Agreement's authors to draft only a partial solution without ever affirmatively so stating.[18]

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[18] Because the Agreement is an interstate compact, its terms cannot be amended unilaterally by one or even several signatory jurisdictions. Thus the Court's reliance on Congress' 1970 description of "detainer" to support its conclusion about what the Agreement's 1957 terms may have meant, *ante*, at 728–729, is illegitimate; "post-passage remarks of legislators, however, explicit, cannot serve to change . . . legislative intent." *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 132 (1974). It is entirely possible that late-joining jurisdictions might have different reasons for signing the Agreement, see, *e. g.*, *ante*, at 731, n. 9 (Congress joined the Agreement in part to vindicate speedy trial rights), and even varying interpretations of the Agreement's terms. But such differences can in no way alter the original understanding that generated the particular terms as written. Indeed, New Jersey as well as 24 other States had already joined the Agreement by the time Congress considered the law. Subsequent narrowing of the terms by the remarks of federal legislators is thus particularly inappropriate in this case.

It should also be noted that Congress' discussion of detainers came in reaction to the decisions in *Smith* v. *Hooey*, 393 U. S. 374 (1969), and *Dickey* v. *Florida*, 398 U. S. 30 (1970), cases which involved detainers based on criminal charges. See S. Rep. No. 91–1356, at 1. The Council of State Governments provided a much more comprehensive definition when it proposed the Agreement. See n. 4, *supra*. The Court does not explain why this broad statement is dismissed as merely a "general definition," *ante*, at 726–727, while Congress' later and contextually specific discussion is relied upon to demonstrate intent, *ante*, at 728–729.

V

We have recently noted that remedial statutes do not "take on straitjackets upon enactment." *Dowling* v. *United States*, *ante*, at 228. This should especially be true in the case of interstate compacts entered into by some 50 different legislative Acts and therefore much less amenable to subsequent amendment.[19] Much has changed since 1957 in the law of corrections; a probationer is now entitled to an in-person hearing before a term of incarceration is reimposed, *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973); see *Black* v. *Romano*, 471 U. S. 606, 612 (1985), and the rehabilitative ethic that motivated the Agreement has, for better or worse, been largely abandoned.[20] Thus timely disposition of probation-violation detainers now requires the expense of transportation for the prisoner to and from the charging jurisdiction,[21] while the re-

[19] Kentucky has in fact attempted to amend the Agreement to apply explicitly to probation- and parole-violation detainers. Ky. Rev. Stat. § 440.455(2) (1985). Kentucky's amendment expressly notes, however, that it can be "binding only . . . between those party states which specifically execute the same" amendment. § 440.455(1). Since no other State has enacted such an amendment, Kentucky's law has no effect and, after today's decision, the will of its legislature stands frustrated.

[20] See, *e. g.*, S. Rep. No. 98-225, p. 38 (1983) ("[T]oday, criminal sentencing is based largely on an outmoded rehabilitation model. . . . Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting"); A. von Hirsch, Doing Justice: The Choice of Punishments xxxvii, 11–18 (1976); Bainbridge, The Return of Retribution, 71 ABA Journal 60 (May 1985). By comparison, in 1959 one of the framers of the Agreement, Director of the Federal Bureau of Prisons James V. Bennett, termed detainers "a vestigial remnant of the age-old concept of retributive justice. No purpose is served except the destructive expression of a primitive urge for vengeance." Bennett, "The Last Full Ounce," 23 Fed. Prob., at 20.

[21] See, *e. g.*, *Padilla* v. *State*, 279 Ark. 100, 104, 648 S. W. 2d 797, 799 (1983) (Smith, J., concurring) (since probation-violation hearing would be "useless," reading Agreement to require transportation of prisoner from California and back for disposition of probation-violation detainer would be "holding the taxpayers of Arkansas for ransom").

habilitative benefits previously thought to accrue from such disposition are now discounted. Yet no one argues that an important remedial purpose of the Agreement as written—disposition of any detainer that could result in additional incarceration in order to produce certainty for in-prison programming—is not fully invoked by probation-violation detainers. In light of this fact, policy arguments that evidence only dissatisfaction with the Agreement's underlying purposes or chosen means are illegitimate, nonjudicial bases for decision.

Ultimately, the Court's decision rests on its conclusion that although the purposes of the Agreement are "advanced" when linked to probation-violation detainers, this is "significantly less" so than when the detainer is based on an outstanding criminal charge. *Ante*, at 734. Ignoring the bulk of the legislative history as well as the purpose of the Agreement to produce certainty described above, the Court defers instead to claims of "administrative costs" and paternalistic arguments regarding the "desirab[ility of] delay"[22] for pris-

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[22] As the Court acknowledges, a prisoner may well have "a legitimate interest in obtaining prompt disposition of a probation-violation charge." *Ante*, at 733. Although delaying disposition of a detainer may in some circumstances be desirable, the Agreement currently leaves the decision of whether to invoke its terms up to the prisoner. *Ibid.*; see Art. III (disposition required only after prisoner "cause[s] to be delivered" a request for final disposition). It is a cruel irony for the Court to note legitimate interests in prompt disposition at the same time it takes the choice away, for under the Court's result a prisoner will now be unable to dispose of a probation-violation detainer no matter how long it lingers or how frivolous its basis may be, unless the charging jurisdiction wants to do so. See Dauber, 7 Crim. L. Bull., at 680 (statistics indicate that "[p]arole and probation detainers . . . usually remain unresolved the longest"). As JUSTICE STEVENS noted in his dissent in *Moody* v. *Daggett*, 429 U. S. 78, 94, n. 8 (1976), "if a prisoner would rather face the uncertainty and restrictions which might occur because of an outstanding detainer in hopes that the [federal Parole] Commission would prove more lenient at a later revocation hearing, he could certainly waive his right" to prompt disposition.

oners. *Ante*, at 733–734.[23] Thus Article IX is read out of the Agreement, and the rationale of *Mauro* is turned on its head. Rather than determining whether the purposes of the Agreement can be achieved within a fair reading of its terms, the Court decides that if the "plain language" of the Agreement is amenable to a narrow reading, advancement of the Agreement's purposes is insufficient reason to apply its directives. By this backwards reasoning the scope of the Agreement is now restricted to only two-thirds or less of all detainers. Consequently, as would have been the case in *Mauro* had this Court not properly exercised its authority to construe federal law, prosecutors will once again be able to file certain detainers for little or no reason and "gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended." 436 U. S., at 364 (footnotes omitted).

I respectfully dissent.

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[23] Reference to such arguments, as well as to alternative language the Court would find "more appropriate" for the Agreement, *ante*, at 728, renders the Court's veiled criticism of the Court of Appeals' "policy analysis," *ibid.*, completely ineffective. Indeed, *Mauro* and *Cuyler* indicate that such analysis *with regard to the policies of the Agreement* is entirely appropriate.

Syllabus

OREGON DEPARTMENT OF FISH AND WILDLIFE ET AL. *v.* KLAMATH INDIAN TRIBE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83–2148. Argued February 27, 1985—Decided July 2, 1985

By an 1864 Treaty, certain Indian Tribes (now collectively known as respondent Klamath Indian Tribe) ceded their aboriginal title to certain lands in Oregon to the United States, and a reservation was created securing to the Tribe "the exclusive right of taking fish in the streams and lakes, included in said reservation." The Treaty language has been construed in earlier litigation also to reserve to the Tribe the right to hunt and trap game within the reservation. No right to hunt or fish outside the reservation was expressly preserved. Subsequently a dispute arose as to the reservation's boundaries, and after lengthy negotiations concerning the value of land that had been erroneously excluded from the reservation, the Tribe and the Government executed a 1901 Cession Agreement (ratified by Congress) under which the Tribe, upon receiving payment from the Government, ceded some of the reservation land to the Government. The Agreement provided that the Tribe conveyed to the Government "all their claim, right, title and interest in and to" the ceded land, and that "nothing in this agreement shall be construed to deprive [the Tribe] of any benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement." Tribe members continued to hunt and fish on the ceded lands, apparently without any assertion of regulatory jurisdiction by the State of Oregon. In 1982 the Tribe instituted this action in Federal District Court against petitioners Oregon Department of Fish and Wildlife and various state officials, seeking an injunction against interference with tribal members' hunting and fishing activities on such lands (other than ceded lands that are now privately owned). The District Court entered summary judgment for the Tribe, declaring that the 1901 Agreement did not abrogate the Tribe's 1864 Treaty right to hunt and fish on the ceded lands free from state regulation. The Court of Appeals affirmed.

Held: In light of the terms of the 1901 Agreement and the 1864 Treaty, and certain other events in the Tribe's history, the Tribe's exclusive right to hunt and fish on the lands reserved to the Tribe by the 1864 Treaty did not survive as a special right to be free of state regulation in the ceded lands that were outside the reservation after the 1901 Agreement. Pp. 766–774.

(a) The 1864 Treaty's language indicates that the Tribe's right to hunt and fish was restricted to the reservation, and the 1901 Agreement's broad language accomplished a diminution of the reservation boundaries. No language in the 1901 Agreement evidenced any intent to preserve special off-reservation hunting or fishing rights for the Tribe, and, in light of the 1901 diminution, a silent preservation of off-reservation rights would have been inconsistent with the broad language of cession as well as with the Tribe's 1864 Treaty agreement to remain within the reservation "unless temporary leave of absence be granted." Pp. 766–770.

(b) Silence in the 1901 Agreement with regard to tribal hunting and fishing rights does not demonstrate an intent to preserve such rights in the ceded land. The historical record of the lengthy negotiations between the Tribe and the Government provides no reason to reject the presumption that the 1901 Agreement fairly describes the entire understanding between the parties. Nor does the absence of any payment expressly in compensation for hunting and fishing rights on the ceded lands demonstrate that the parties did not intend to extinguish such rights in 1901. The Tribe's contention to the contrary rests on its incorrect assumption that the 1864 Treaty created hunting and fishing rights that were separate from and not appurtenant to the reservation. Pp. 770–774.

729 F. 2d 609, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 775. POWELL, J., took no part in the decision of the case.

Dave Frohnmayer, Attorney General of Oregon, argued the cause for petitioners. With him on the briefs were *William F. Gary*, Deputy Attorney General, *James E. Mountain, Jr.*, Solicitor General, and *Michael D. Reynolds* and *Margaret E. Rabin*, Assistant Attorneys General.

Don B. Miller argued the cause for respondent. With him on the brief were *Kim Jerome Gottschalk* and *Sande Schmidt*.

JUSTICE STEVENS delivered the opinion of the Court.

In 1901 the Klamath Indian Tribe ceded 621,824 acres of reservation land to the United States. The question pre-

sented in this case is whether the Tribe thereafter retained a special right to hunt and fish on the ceded lands free of state regulation. In answering that question we consider not only the terms of the 1901 Cession Agreement but also the predecessor 1864 Treaty that established the Tribe's original reservation and certain other events in the history of the Tribe.

I

In the early 19th century, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians claimed aboriginal title to approximately 22 million acres of land extending east from the Cascade Mountains in southern Oregon. In 1864 these Tribes (now collectively known as the Klamath Indian Tribe) entered into a Treaty with the United States, ceding "all their right, title and claim to all the country claimed by them" and providing that a described tract of approximately 1.9 million acres "within the country ceded" would be set apart for them, to be "held and regarded as an Indian reservation." 16 Stat. 707, 708.[1] The 1864 Treaty also provided that the Tribes would have "secured" to them "the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits." *Ibid.*[2] No right to hunt or fish outside the reservation was preserved.

The boundaries of the reservation were first surveyed by the United States in 1871. Members of the Tribe immediately complained that the surveyor had erroneously excluded

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[1] Treaty of Oct. 14, 1864 (ratified by the Senate on July 2, 1866, and proclaimed by President Grant on February 17, 1870).

[2] Relying on our decision in *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968), the Court of Appeals for the Ninth Circuit has held that the language of the 1864 Treaty also served to reserve for the Tribe a right to hunt and trap game within the reservation, as well as the rights to fish and gather. *Kimball* v. *Callahan*, 493 F. 2d 564, 566, cert. denied, 419 U. S. 1019 (1974). See also *California & Oregon Land Co.* v. *Worden*, 85 F. 94, 97 (CC Ore. 1898) (Klamath's 1864 Treaty "operates as a reservation of the rights held by the Indians at the time the treaty was entered into").

large areas of land from the reservation as described in the 1864 Treaty. These complaints continued after the Government resurveyed the boundaries, and slightly enlarged them, in 1888. In response to these complaints, in 1896 Congress authorized a Boundary Commission to determine the amount and value of the land that had been incorrectly excluded from the reservation.[3]

In October 1896, the three-member Boundary Commission visited the reservation, traveled its disputed boundaries with a Klamath Indian guide, and interviewed a number of Klamath Indians who had participated in the negotiation of the 1864 Treaty. See Klamath Boundary Commission Report (Dec. 18, 1896), reprinted in S. Doc. No. 93, 54th Cong., 2d Sess., 5–19 (1897). These Indians specifically recalled that the parties to the 1864 Treaty had intended to include the Sycan and Sprague River Valleys within the eastern portion of the reservation because those valleys had been an important source of fish and game for members of the Tribe.[4]

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[3] Act of June 10, 1896, ch. 398, 29 Stat. 321, 342. The Act provided:

"That the President of the United States is hereby authorized to appoint a commission . . . whose duty it shall be to visit and thoroughly investigate and determine as to the correct location of the boundary lines of the Klamath Indian Reservation. . . . [S]aid commission shall ascertain and determine, as nearly as practicable, the number of acres, if any, of the land, the character thereof, and also the value thereof, in a state of nature, that have been excluded from said treaty reservation by the erroneous survey . . . ."

[4] Thus, Henry Blow, a former Klamath Tribe chief who had signed the 1864 Treaty, testified as follows:

"Q. Was anything said by Mr. Huntington [the United States' treaty negotiator] or the Indians about Sycan or Sprague River Valley?

"A. Yes; the Indians said they wanted to keep these two valleys for the camas roots and pastures, the fish, etc., as well as the game in the mountains." S. Doc. No. 93, 54th Cong., 2d Sess., 14 (1897).

Mo Ghen Kas Kit, a chief of the Klamath Tribe at the time of the 1864 Treaty negotiations and a Treaty signatory, testified:

"At the time of the treaty of Council Grove we, the Indians, told Mr. Huntington, before and after describing these points, that we particularly wanted all the Sycan Valley down to Ish tish e wax [place of small fish],

Based on its review of the 1864 negotiations and the geographical description provided in the Treaty itself, the Boundary Commission concluded that over 617,000 acres of land had been erroneously excluded from the reservation in previous Government surveys. *Id.*, at 11.

The Boundary Commission determined that the excluded land had an average value of 83.36 cents per acre. This figure took into account "the good timber land and the meadows of the Sycan and Sprague River valleys" as well as the "rocky and sterile mountain ranges, producing very ordinary timber and little grass."[5] The Commission's valuation was based on the use of the land for stock grazing and as a source of

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including the Sprague River Valley, because we needed it, especially for the camas and other roots in the valley and the game and the fishing . . . .

. . . . . .

"The Indians particularly told Mr. Huntington of this great need of these two valleys for this purpose, and they were dependent upon them principally for their living. All the headmen and leaders among the Indians saying this—and Mr. Huntington said 'I will,'—you shall have them in the treaty." *Id.*, at 15–16.

[5] The Boundary Commission reported:

"The character of the excluded areas varies greatly. There are some limited tracts of good meadow and grazing land, but the major portion of the area is of inferior quality. With the exception of the meadows of the Sycan and Sprague River sections, which are the principal bone of contention, the greater part of the excluded land consists of rocky and sterile mountain ranges, producing very ordinary timber and little grass.

"The territory in the vicinage of Mounts Scott and Cowhorn on the northwest and north is especially of little or no value.

"Being of volcanic formation, the land consists of substrata of basalt and pumice stone lightly covered with volcanic ashes and decomposed pumice, offering scanty sustenance to vegetation.

"The extensive areas embraced in the eastern slopes and spurs of Yamsay Mountains and the western of Winter Ridge are likewise of little worth owing to their rugged and rocky formation.

"Giving these inferior tracts, the good timber land and the meadows of the Sycan and Sprague River valleys their proportionate valuation, we determine the value of the excluded land to be $533,270, or 617,490 acres at 86.36 cents per acre." *Id.*, at 11.

timber. Its report did not discuss hunting or fishing on the excluded lands, nor did it advert to any valuation for the right to conduct such activities on the land.[6]

Upon receiving the Boundary Commission's report, Congress appropriated funds in 1898 for a precise "resurvey of the exterior boundaries of the Klamath Reservation," and authorized the Secretary of the Interior "to negotiate through an Indian inspector with said Klamath Indians for the relinquishment of all their right and interest in and to" the excluded lands. Act of July 1, 1898, ch. 545, 30 Stat. 571, 592.

The course of negotiations with the Tribe extended over the next two years. The Tribe was assisted by counsel and actively asserted its interests when those interests diverged from the proposals of the United States.[7] Yet the historical

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[6] Citing the Boundary Commission's report, the parties to this litigation stipulated:

"The Boundary Commission did not take the value of the Tribe's hunting, fishing and trapping rights into account when arriving at its valuation of the land." App. 12.

[7] Negotiation of the final agreement required the efforts of two different negotiators for the United States, first Inspector William J. McConnell and then Inspector James McLaughlin. Throughout the negotiations, the Tribe's central concerns were that it receive some immediate cash payment as a portion of the purchase price, that the remainder be available for use at the Tribe's discretion at least to some degree, and that specific expenditures for irrigation of reservation lands be charged only to Tribe members who would benefit directly from the irrigation. See H. R. Doc. No. 156, 56th Cong., 2d Sess., 10–12 (1900) (letter from Wm. J. McConnell to Secretary of the Interior (Jan. 2, 1899)); *id.*, at 28–30 (letter from J. McLaughlin to Secretary of the Interior (Oct. 29, 1900)); H. R. Doc. No. 79, 57th Cong., 1st Sess., 5 (1901) (letter from J. McLaughlin to Secretary of the Interior (June 19, 1901)). Inspector McConnell apparently lacked authority to agree to some of these terms and, after the Tribe *rejected* McConnell's initial proposals, it proposed a general agreement depositing the full sum recommended by the Boundary Commission with the United States Treasury in the Tribe's name. H. R. Doc. No. 156, 56th Cong., 2d Sess., 11–12 (1900). "As this was their ultimatum," McConnell reported, "I concluded the agreement." *Id.*, at 12.

Despite his negotiation of this agreement, however, Inspector McConnell also reported that, in his opinion, the excluded land was for the

record provided by a number of congressional documents contains no reference to continuation of any special hunting or fishing rights for members of the Tribe after payment for the excluded lands. No objection by the Tribe to resolving the problem by selling the excluded lands to the Government appears anywhere in the record.[8] Although one Government

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most part "practically worthless," and that he believed Congress should restore the unentered excluded acreage to the Tribe rather than purchase it. *Id.*, at 10. If Congress nevertheless chose to purchase all the excluded acreage, McConnell recommended, "the sum to be paid [to the Tribe] should not exceed $250,000," as opposed to the $533,270 that the Boundary Commission had suggested. *Ibid.*

Shortly after McConnell submitted this report, two attorneys for the Tribe wrote to the Commissioner of Indian Affairs criticizing McConnell's views as gratuitous "individual opinion." The Tribe's attorneys requested that "further investigation" be made, "so that full and complete information on this question may be presented to Congress." *Id.*, at 18–19 (letter from J. McCammon and R. Belt to the Hon. W. Jones (Apr. 10, 1899)). In light of the Tribe's objections, and because the United States also was not satisfied with McConnell's agreement in light of his negative report, *id.*, at 21 (letter from A. Tonner to Secretary of the Interior (May 15, 1899)), the second inspector, James McLaughlin, was dispatched to evaluate the excluded lands and negotiate a new agreement. *Id.*, at 22.

[8]The excluded lands posed a problem to the Tribe as well as to the United States because after the erroneous 1871 survey some of the excluded lands had been entered upon and settled by non-Indians. See S. Exec. Doc. No. 129, 53d Cong., 2d Sess., 4 (1894) (extract from annual report of U. S. Indian Agent Joseph Emery for 1887) (noting competing claims of Klamath Indians and "white settlers and cattlemen in the vicinity"); Attachment to S. Exec. Doc. No. 129 (map indicating existence of 34 "townships" outside 1871 reservation boundaries but within the "approximate limits claimed by Indians"). See also T. Stern, The Klamath Tribe 87 (1965). In 1899, Inspector McConnell reported that 62,361 acres of the excluded lands had been "entered" by non-Indians, including 7,080 acres allotted to "proposed settlers," "leaving a balance of 555,129 acres . . . yet unoccupied." H. R. Doc. No. 156, 56th Cong., 2d Sess., 10 (1900) (letter from Wm. J. McConnell to Secretary of the Interior (Jan. 2, 1899)).

Although the Boundary Commission and Congress apparently assumed that the United States would pay the Tribe for the excluded land, rather than restore it to the reservation, the United States' first negotiator, Inspector McConnell, suggested that the unentered excluded acreage should be restored to the Tribe with payment being made only for acres that had

inspector felt that the price recommended by the Boundary Commission was too high, see n. 7, *supra*, the Commission's recommendation ultimately was accepted.[9] The final Cession Agreement was signed by 191 adult male members of the Tribe on June 17, 1901.[10]

In the 1901 Agreement, the United States agreed to pay the Tribe $537,007.20 for 621,824 acres of reservation land. In return, the Tribe agreed in Article I to "cede, surrender, grant, and convey to the United States all their claim, right, title and interest in and to" that land. The reservation was thereby diminished to approximately two-thirds of its original size as described in the 1864 Treaty.[11] The 1901 Agree-

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already been entered upon. *Ibid.* As already noted, n. 7, *supra*, the attorneys for the Tribe objected to McConnell's report. Although the Department of the Interior considered McConnell's suggestions, it ultimately decided to recommend to Congress that all the excluded lands be purchased.

[9] The second inspector, James McLaughlin, reported that

"whilst it is true that there are a great many acres of valueless land in the said tract, yet there are many acres of arable land which already possess considerable value, and an immense amount of pine timber that must become very valuable in the near future; and, when taking into consideration the twenty-nine years that the Klamath Indians have been deprived of these lands, together with the value of the valleys, meadows, and heavily timbered portions, I most heartily indorse the price . . . ." H. R. Doc. No. 156, at 28.

[10] The substantive terms of the agreement had been negotiated by McLaughlin with the Tribe's negotiating committee over a 3-day period in October 1900. *Id.*, at 29. That agreement, however, mistakenly referred to the 1871 survey of the reservation rather than the 1888 survey. To correct this error, McLaughlin returned to the reservation in June 1901 to obtain the Tribe's assent to an agreement identical to the 1900 agreement but for substitution of the phrase "approved in 1888 by" for "made in 1871 under the authority of" in Article I. H. R. Doc. No. 79, 57th Cong., 1st Sess., 5 (1901) (letter from J. McLaughlin to the Secretary of the Interior (June 19, 1901)).

[11] The Senate Report recommending approval of the 1901 Agreement expressly referred to the "diminished reservation" of the Tribe. S. Rep. No. 198, 59th Cong., 1st Sess., 13 (1906).

ment also provided in Article IV that "nothing in this agreement shall be construed to deprive [the Tribe] of any benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement."

The 1901 Agreement was ratified by Congress in 1906. Act of June 21, 1906, ch. 3504, 34 Stat. 325, 367. Between 1901 and 1906, virtually all of the ceded land was closed to settlement entry and placed in national forests or parks, App. 14, a status much of the land retains to this day. The parties have stipulated that members of the Tribe continued to hunt and fish on the ceded lands, from the time of the cession to the commencement of this litigation in 1982. *Ibid.* During that period, there is no record of any assertion by the State of Oregon, or any denial by the Tribe, of state regulatory jurisdiction over Indian hunting or fishing on the ceded lands. *Id.*, at 15. It is also stipulated that hunting, fishing, trapping, and gathering were "crucial to the survival" of the Klamath Indians in 1864, 1901, and 1906, and that these activities continue to "play a highly significant role" in the lives of Klamath Indians. *Id.*, at 19.

II

In 1954, Congress terminated federal supervision over the Klamath Tribe and its property, including the Klamath Reservation. Pub. L. 587, 68 Stat. 718–723, as amended, 25 U. S. C. §§ 564–564x. The Termination Act required members of the Tribe to elect either to withdraw from the Tribe and receive the monetary value of their interest in tribal property, or to remain in the Tribe and participate in a nongovernmental tribal management plan. § 564d(a)(2). The Termination Act also authorized the sale of that portion of the reservation necessary to provide funds for the compensation of withdrawing members, and the transfer of the unsold portion to a private trustee. § 564e(a).[12] The Termination

[12] Of the 2,133 persons listed on the final tribal roll of 1954, 1,660 elected to withdraw from the Tribe and receive monetary compensation. The

Act further specified that its provisions would not "abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty." § 564m(b).

In 1969, the Indian Claims Commission awarded the Tribe $4,162,992.80 as additional compensation for the lands ceded by the 1901 Agreement. *Klamath and Modoc Tribes* v. *United States*, 20 Ind. Cl. Comm'n 522. As had been the case in 1896 and in 1901, the amount of the Commission's award was based on the estimated value of the land for stock grazing and timber harvesting, which the parties had agreed constituted the "highest and best uses" for the land. *Id.*, at 525. The Claims Commission's opinion did not specify a value for, or mention, hunting or fishing rights.

III

In 1982 the Tribe filed this action against the Oregon Department of Fish and Wildlife and various state officials, seeking an injunction against interference with tribal members' hunting and fishing activities on the lands ceded in 1901. The State conceded that it had no authority to interfere with tribal hunting or fishing on lands sold or transferred pursuant to the 1954 Termination Act, but it asserted the right to enforce state regulations against the Tribe on the lands that had been ceded in 1901.

The essential facts were stipulated. The District Court entered summary judgment in favor of the Tribe, declaring that the 1901 Agreement "did not abrogate" the Tribe's 1864 "treaty rights . . . to hunt, fish, trap and gather, free from regulation by the . . . State of Oregon" on the ceded lands.[13]

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remaining 473 tribe members retained a participatory interest in the management of the remainder of the reservation. *Kimball* v. *Callahan*, 493 F. 2d, at 567. At least as of 1979, the Klamath Tribe continued to maintain a tribal constitution, a tribal government, and a tribal Game Commission. *Kimball* v. *Callahan*, 590 F. 2d 768, 776, and n. 14 (CA9), cert. denied, 444 U. S. 826 (1979).

[13] App. 23. The Tribe's complaint had alleged that the "ceded lands" included 87,000 acres granted, "without the knowledge or consent of the

The District Court relied on the language in Article IV of the 1901 Agreement preserving any benefits to which the Tribe was "entitled under existing treaties not inconsistent with the provisions of this agreement," and on the Government's failure to compensate the Tribe expressly for the loss of hunting and fishing rights either in 1901 or 1969.

The Court of Appeals affirmed. 729 F. 2d 609 (1984). It held that the 1864 Treaty had reserved to the Tribe rights to hunt and fish that were not appurtenant to the land itself. Accordingly, when the erroneously excluded lands were ceded to the United States in 1901, that cession did not necessarily include the hunting and fishing rights. Construing the 1901 Agreement in the Indians' favor, the Court of Appeals concluded that the Tribe had retained all rights consistent with the cession not expressly conveyed. The court then ruled that continued hunting and fishing by the Indians on the ceded lands was not necessarily inconsistent with the provisions of the 1901 Agreement. The omission of any reference to hunting or fishing rights, and the failure to compensate the Tribe expressly for such rights, supported the conclusion that Congress had not intended to abrogate them, and

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plaintiff and without payment of compensation," by the Secretary of the Interior to the California & Oregon Land Company pursuant to an exchange authorized by Congress in 1906. *Id.*, at 5–6. The controversy regarding title to and compensation for these exchanged acres has come before this Court on more than one occasion. See *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119 (1938); *Klamath and Moadoc Tribes* v. *United States*, 296 U. S. 244 (1935); *United States* v. *California & Oregon Land Co.*, 192 U. S. 355 (1904); *United States* v. *California & Oregon Land Co.*, 148 U. S. 31 (1893); *United States* v. *Dalles Military Road Co.*, 140 U. S. 599 (1891). See generally O'Callaghan, Klamath Indians and the Oregon Wagon Road Grant, 1864–1938, 53 Oregon Historical Quarterly 23 (1952). Although the District Court's judgment encompassed the right to fish and hunt on these exchanged acres, App. 23, the Court of Appeals did not explicitly address the merits of the Tribe's allegations relating to those lands, and the parties have not mentioned the issue here. We express no opinion on any separate questions related to those lands.

the State had not otherwise sustained its burden of demonstrating a clear congressional intent to extinguish these tribal treaty rights. *Id.*, at 612–613.

Because the Court of Appeals' decision appeared to conflict in principle with the decision of the Eighth Circuit in *Red Lake Band of Chippewa Indians* v. *Minnesota*, 614 F. 2d 1161 *(per curiam)*, cert. denied, 449 U. S. 905 (1980),[14] we granted certiorari, 469 U. S. 879 (1984). We now reverse.

IV

At issue in this case is an asserted right of tribal members to hunt and fish outside the reservation boundaries established in 1901, free of state regulation. The Tribe argues that this special right continued on the lands that were ceded in the 1901 Agreement, even though the reservation boundaries were diminished and the exclusivity of the 1864 Treaty rights necessarily expired on the ceded lands. The Tribe agrees that ceded lands now privately owned may be closed to tribal hunting and fishing, and that the Federal Government validly may regulate Indian activity on the ceded lands now held as national parks or forests. See 729 F. 2d, at 611; Brief for Respondent 12, 17. It is also clear that non-Indians may hunt and fish on at least some of the ceded lands and that members of the Tribe are entitled to the same hunting and fishing privileges as all other residents of Oregon.[15] Our in-

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[14] In *Red Lake Band*, a band of Chippewa Indians had ceded "all our right, title, and interest in and to" two parcels of land in agreements ratified by Congress in 1889 and 1904. 614 F. 2d, at 1162. The Court of Appeals for the Eighth Circuit ruled that the Band had thereby given up its tribal "rights to hunt, fish, trap and gather wild rice free of the state's regulation of such activities," despite the Band's claim that diminishment of the reservation boundaries in the 1889 and 1904 Acts did not abrogate such rights absent explicit reference. *Ibid.*

[15] In this sense, the off-reservation rights claimed by the Tribe here are somewhat comparable to the off-reservation right "of taking fish at all usual and accustomed places, in common with citizens of the Territory" explicitly reserved in the Treaty construed in *Puyallup Tribe* v. *Depart-*

quiry, therefore, is whether a special right, nonexclusive but free of state regulation, was intended to survive in the face of the language of the 1901 Agreement ceding "all . . . right . . . in and to" the ceded lands.[16]

The Court of Appeals' holding was predicated on its understanding that the hunting and fishing rights reserved to the Tribe by the 1864 Treaty were not appurtenant to the land within the reservation boundaries. 729 F. 2d, at 612. We agree with the Court of Appeals that Indians may enjoy special hunting and fishing rights that are independent of any

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ment of Game of Washington, 391 U. S. 392 (1968), and *United States* v. *Winans*, 198 U. S. 371 (1905). See n. 16, *infra*.

[16] We have not previously found such absolute freedom from state regulation on nonreservation lands, even in the face of Indian cession agreements that expressly reserved a right to hunt or fish on ceded nonreservation lands. See, *e. g.*, *Puyallup Tribe* v. *Department of Game of Washington*, 391 U. S., at 398 (State may regulate "manner" of Indian fishing although treaty reserved right to take fish "at all usual and accustomed places" including places outside the reservation); *Kennedy* v. *Becker*, 241 U. S. 556, 563–564 (1916) (Indian fishing subject to "appropriate regulation" despite explicit reservation of "the privilege of fishing and hunting" in cession agreement); *United States* v. *Winans*, 198 U. S., at 384 (although reserved right to take fish at "all usual and accustomed places" outside the reservation implies an easement over private lands, it does not otherwise "restrain the state unreasonably . . . in the regulation of the right"); see also *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 682–684 (1979) (reserved Indian right to "take fish" off the reservation is not an "untrammeled right" and is subject to "nondiscriminatory" conservation regulation by the State); Hobbs, Indian Hunting and Fishing Rights, 32 Geo. Wash. L. Rev. 504, 525, 532 (1964).

Indeed, as we have unanimously noted:

"Our cases have recognized that tribal sovereignty contains 'a significant geographical component.' Thus the off-reservation activities of Indians are generally subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the contrary.'" *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 335, n. 18 (1983) (citations omitted).

See also *Kake Village* v. *Egan*, 369 U. S. 60, 75 (1962) ("State authority over Indians is . . . more extensive over activities . . . not on any reservation").

ownership of land,[17] and that, as demonstrated in 25 U. S. C. § 564m(b), the 1954 Termination Act for the Klamath Tribe, such rights may survive the termination of an Indian reservation.[18] Moreover, the Court of Appeals was entirely correct in its view that doubts concerning the meaning of a treaty with an Indian tribe should be resolved in favor of the tribe. See *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 675–676 (1979); *Carpenter* v. *Shaw*, 280 U. S. 363, 367 (1930). Nevertheless, we cannot agree with the court's interpretation of the 1901 Cession Agreement or with its reading of the 1864 Treaty.

V

Before the 1864 Treaty was executed, the Tribe claimed aboriginal title to about 22 million acres of land. The Treaty language that ceded that entire tract—except for the 1.9 million acres set apart for the Klamath Reservation—stated only that the Tribe ceded "all their right, title, and claim" to the described area. Yet that general conveyance unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed in over 20 million acres outside the reservation. Presumptively, the similar language used in the 1901 Cession Agreement should have the same effect.

More importantly, the language of the 1864 Treaty plainly describes rights intended to be exercised within the limits of the reservation. This point can be best understood by consideration of the entire portion of the Treaty in which the right of taking fish is described. The relevant language of the 1864 Treaty is found in Article I:

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[17] *E. g.*, *Antoine* v. *Washington*, 420 U. S. 194 (1975), and cases cited in n. 16, *supra*.

[18] See *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968); *Kimball* v. *Callahan*, 590 F. 2d, at 772 (Klamath Indians retain right to hunt and fish on lands within "the former reservation at the time of the [1954 Termination] Act's enactment").

"That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation . . . . And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

"It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employés of the Indian department, and officers of the army of the United States . . . [and] that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid . . . ." 16 Stat. 708.

The fishing right thus reserved is described as a right to take from the streams and lakes "included in said reservation," and the gathering right is for edible roots, seeds, and berries "within its limits." This limiting language surely indicates that the fishing and gathering rights pertained to the area that was reserved for the Indians and from which non-Indians were excluded. Although hunting is not expressly mentioned in the Treaty, it is clear that any exclusive right to hunt was also confined to the reservation. The fact that the rights were characterized as "exclusive" forecloses the possibility that they were intended to have existence outside of the reservation; no exclusivity would be possible on lands open to non-Indians. Moreover, in view of the fact that Article I restricted members of the Tribe to the reservation, to "remain thereon, unless temporary leave of absence

be granted," it is manifest that the rights secured to the Indians by that same Article did not exist independently of the reservation itself.

The language of the 1901 Agreement must be read with these terms of the 1864 Treaty in mind. In 1954 when Congress terminated the Klamath Reservation, it enacted an express provision continuing the Indians' right to fish on the former reservation land. 25 U. S. C. § 564m(b); see *Kimball* v. *Callahan*, 590 F. 2d 768 (CA9), cert. denied, 444 U. S. 826 (1979). The 1901 Agreement contained no such express provision concerning the right to hunt and fish on the lands ceded by the Tribe. Instead, the 1901 Agreement contained a broad and unequivocal conveyance of the Tribe's title to the land and a surrender of "*all* their claim, *right*, title, and interest *in and to*" that portion of the reservation. 34 Stat. 367 (emphasis added).[19] The 1901 Agreement thus was both a divestiture of the Tribe's ownership of the ceded lands and a diminution of the boundaries of the reservation within which the Tribe exercised its sovereignty. In the absence of any language reserving any specific rights in the ceded lands, the normal construction of the words used in the 1901 Agreement unquestionably would encompass any special right to use the ceded lands for hunting and fishing.

This conclusion is unequivocally confirmed by the fact that the rights secured by the 1864 Treaty were "exclusive." Since the 1901 Cession Agreement concededly diminished the reservation boundaries, any tribal right to hunt and fish on the ceded, off-reservation lands can no longer be "exclusive" as specified in the 1864 Treaty. Indeed, even if the Tribe had expressly reserved a "privilege of fishing and hunting" on the ceded lands, our precedents demonstrate that such an express reservation would not suffice to defeat the State's

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[19] We previously have described such language as "express language of cession." *Solem* v. *Bartlett*, 465 U. S. 463, 469, n. 10 (1984).

power to reasonably and evenhandedly regulate such activity. See n. 16, *supra*. In light of these precedents, the absence of any express reservation of rights, as found in other 19th-century agreements, only serves to strengthen the conclusion that no special off-reservation rights were comprehended by the parties to the 1901 Agreement.[20]

As both the District Court and the Court of Appeals noted, Article IV of the 1901 Agreement preserved all of the Klamath Indians' "benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement." Article IV thus made it clear that none of the benefits that the Tribe had preserved within its reservation in the 1864 Treaty would be lost. But because the right to hunt and fish reserved in the 1864 Treaty was an exclusive right to be exercised within the reservation, that right could

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[20] In *United States* v. *Winans*, 198 U. S. 371 (1905), Yakima Indians sought to exercise their treaty right to take fish "at all usual and accustomed places," including places outside the reservation on land previously owned by and open to the Yakima but later ceded. Private owners of land fronting on some of those places subsequently asserted a right to bar Indians from their property. In holding that the Indians retained a right to cross private property to reach their usual fishing places, the Court stated: "New conditions came into existence, to which [the Tribe's fishing] rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away." *Id.*, at 381. The Tribe relies on *Winans* for the proposition that its right to hunt and fish on the ceded lands similarly should be considered limited by necessity but not extinguished. *Winans*, however, expressly noted that the State possessed the power to reasonably regulate the Yakima's off-reservation fishing. *Id.*, at 384; see n. 16, *supra*. Moreover, the cession agreement in *Winans* expressly reserved the right to fish on nonreservation lands. The only question presented was whether that clearly stated right was to be frustrated because of subsequent transfers of ceded lands to private parties. The Court found, as a matter of intent, that the 1859 Yakima Treaty could not be so interpreted. 198 U. S., at 381. The present case, however, involves the necessarily precedent question whether any off-reservation rights were intended to be preserved at all. *Winans* sheds no light on how that question should be resolved.

not consistently survive off the reservation under the clear provisions of cession and diminution contained in Article I. Moreover, a glaring inconsistency in the overall Treaty structure would have been present if the Tribe simultaneously could have exercised an independent right to hunt and fish on the ceded lands outside the boundaries of the diminished reservation while remaining bound to honor its 1864 Treaty commitment to stay within the reservation absent permission. Article IV cannot fairly be construed as an implicit preservation of benefits previously linked to the reservation when those benefits could be enjoyed thereafter only outside the reservation boundaries.[21]

In sum, the language of the 1864 Treaty indicates that the Tribe's rights to hunt and fish were restricted to the reservation. The broad language used in the 1901 Agreement, virtually identical to that used to extinguish off-reservation rights in the 1864 Treaty, accomplished a diminution of the reservation boundaries, and no language in the 1901 Agreement evidences any intent to preserve special off-reservation hunting or fishing rights for the Tribe. Indeed, in light of the 1901 diminution, a silent preservation of off-reservation rights would have been inconsistent with the broad language of cession as well as with the Tribe's 1864 Treaty agreement to remain within the reservation.

VI

The Tribe acknowledges that the 1901 Agreement is silent with regard to hunting and fishing rights, but argues that that silence itself, viewed in historical context, demonstrates

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[21] After the 1864 Treaty was proclaimed, a written pass system apparently was implemented to comply with the "temporary leave of absence" provision of Article I. See T. Stern, The Klamath Tribe 91, 125–126 (1965). Although the record establishes that members of the Tribe continued to hunt and fish outside of the boundaries of the diminished reservation after 1901, App. 14, there is no indication of any concern regarding their legal right to do so until commencement of this litigation.

an intent to preserve tribal hunting and fishing rights in the ceded land. The Tribe asserts that Congress' "singular" purpose in negotiating and ratifying the 1901 Agreement was "to benefit the Indians by honoring the United States' Treaty obligations," and that an intent to extinguish hunting and fishing rights would be inconsistent with this purpose. Brief for Respondent 28–30, and n. 13. We disagree for two reasons.

First, an end to the Tribe's special hunting and fishing rights on lands ceded to the Government, if accomplished with the understanding and assent of the Tribe in return for compensation, is not at all inconsistent with an intent to honor the 1864 Treaty. Having acknowledged an intent to remedy its breach of the 1864 Treaty, the United States might have opted to restore the correct boundaries of the reservation and compensate the Indians for any loss occasioned by the erroneous surveys, or, instead, to acquire the erroneously excluded land for a price intended to represent fair compensation. Both options are consistent with an intent to honor the Treaty obligations. Choice of the purchase and compensation option is also consistent with an intent, on both sides, to end any special privileges attaching to the excluded land. Moreover, since the boundary restoration option would have unquestionably preserved such rights for the Tribe, the rejection of that option is also consistent with an intent not to preserve those rights.

Second, Congress in 1901 was motivated by additional goals. By 1896, non-Indian settlers had moved onto the disputed reservation lands, the State of Oregon had completed a military road across the reservation, and conflicts between members of the Tribe and non-Indians perceived as interlopers were sufficient to require congressional attention. See S. Doc. No. 129, 53d Cong., 2d Sess. (1894); n. 8, *supra*. Negotiations with the Tribe were authorized in order to settle these conflicts as well as to honor fairly the terms of the

1864 Treaty. These goals again suggest two equally consistent options: restoration of the correct reservation boundaries and exclusion of non-Indians as the 1864 Treaty required, or purchase of the excluded, entered-upon lands. Rather than restore the excluded lands to the Tribe—an option that would have left intact the Tribe's exclusive right to hunt and fish on those lands—Congress chose to remove the excluded lands from the reservation, leaving them open for non-Indian use,[22] and to compensate the Indians for the taking.

The historical record of the lengthy negotiations between the Tribe and the United States provides no reason to reject the presumption that the 1901 Agreement fairly describes the entire understanding between the parties. The Tribe was represented by counsel, the tribal negotiating committee members spoke and understood English, and the Tribe secured a number of alterations to the United States' original proposals. H. R. Doc. No. 156, 56th Cong., 2d Sess., 29–30 (1900). Although members of the Tribe had stressed the importance of hunting and fishing on the excluded lands in order to establish their claim to title with the Boundary Commission in 1896, there is no record of even a reference to a right to continue those activities on those lands in the course of negotiating for the cession of the land and all rights "in and

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[22] The Tribe suggests that, because Congress closed virtually all the ceded lands to entry by 1906, this case is to be distinguished from others in which a congressional purpose to open Indian lands to non-Indian settlement might "reveal a clear Congressional intent" to terminate off-reservation Indian rights. Brief for Respondent 33, n. 15; see *Solem* v. *Bartlett*, 465 U. S., at 471. Of course, in our diminishment cases like *Solem*, the question has been whether diminishment has occurred—limitation of tribal rights outside a diminished reservation has been presumed. See, *e. g.*, *id.*, at 467; *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 630–632 (1977) (MARSHALL, J., dissenting); *Mattz* v. *Arnett*, 412 U. S. 481, 483, n. 1 (1973). In this case diminution is acknowledged, and the Tribe poses the entirely different question whether special rights nevertheless survived. Moreover, virtually all of the congressional withdrawal of the ceded lands involved in this case occurred *after* the 1901 Agreement was negotiated and signed. App. 13–14.

to" it. The failure to mention these rights in the face of this language, as well as the specific terms of the 1864 Treaty that would appear to render their continued exercise inconsistent with diminution, strongly supports the conclusion that there existed no contemporary intention specially to preserve those rights.[23]

The Tribe finally contends that the absence of any payment expressly in compensation for hunting and fishing rights on the ceded lands demonstrates that the parties did not intend to extinguish such rights in 1901. This contention again rests entirely on the assumption that the 1864 Treaty created hunting and fishing rights that were separate from and not appurtenant to the reservation. As explained above, that assumption is incorrect. Moreover, the fact that there was no separate valuation of the right to hunt and fish on the ceded lands is consistent with the view that the parties did not understand any such separate right to exist, and that the value of fish, game, and vegetation on the ceded lands was subsumed within the estimated value of the land in general. Indeed, had the parties actually intended to preserve independent hunting and fishing rights for the Tribe on the ceded lands, the Boundary Commission presumably would have computed the value of such rights and explicitly subtracted that amount from the price to be paid for land so encumbered.

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[23] The Tribe ultimately argues that, because the 1901 Agreement "did not say one word about ceding" hunting and fishing rights specifically, we must presume that "the Tribe would reasonably have believed that failure to mention these express Treaty rights could only result in their continuation." Brief for Respondent 37. This belief, if it actually existed, was largely correct, of course: the exclusive rights preserved in the 1864 Treaty were indeed continued *within the reservation* after the 1901 Agreement.

Additionally, the 1901 Agreement cannot really be characterized as "silent" with regard to the preservation of off-reservation rights—it expressly stated that the Tribe ceded all its right in and to the land. Viewed in the entirety of its particular historical context, silence concerning specific rights in the 1901 Agreement is consistent only with an intent to end any special rights of the Tribe outside the reservation. Cf. *Ward* v. *Race Horse*, 163 U. S. 504 (1896).

Moreover, the Tribe has since been afforded an opportunity to recover additional compensation for the ceded lands, in light of the "unconscionable" amount paid in 1906. 20 Ind. Cl. Comm'n, at 530. Yet in that proceeding, which resulted in an award to the Tribe of over $4 million, *id.*, at 543, the Tribe apparently agreed that the "highest and best uses" for the ceded lands were commercial lumbering and livestock grazing, again without mention of any hunting or fishing rights.[24] The absence of specific compensation for the rights at issue is entirely consistent with our interpretation of the 1901 Agreement.

VII

Thus, even though "legal ambiguities are resolved to the benefit of the Indians," *DeCoteau* v. *District County Court*, 420 U. S. 425, 447 (1975), courts cannot ignore plain language that, viewed in historical context and given a "fair appraisal," *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S., at 675, clearly runs counter to a tribe's later claims. Careful examination of the entire record in this case leaves us with the firm conviction that the exclusive right to hunt, fish, and gather roots, berries, and seeds on the lands reserved to the Klamath Tribe by the 1864 Treaty was not intended to survive as a special right to be free of state regulation in the ceded lands that were outside the reservation after the 1901 Agreement. The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

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[24] The Indian Claims Commission's findings of fact include a reference to the "subsistence" value of nonlumbering and nongrazing areas within the ceded lands, without further definition of the term. 20 Ind. Cl. Comm'n, at 536. To the extent that this indicates that the Commission considered hunting, fishing, and gathering of food in determining the value of the land, however, it further undercuts the Tribe's reliance on an alleged failure of compensation for hunting and fishing rights.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The Court today holds that the Klamath Tribe has no special right to hunt and fish on certain lands although it has done so undisturbed from time immemorial. Instead, the Tribe is determined to be subject to state regulation to the same extent as any other person in the State of Oregon. This Court has in the past recognized that Indian hunting and fishing rights—even if nonexclusive, and even if existing apart from reservation lands—are valuable property rights, not fully subject to state regulation and not to be deemed abrogated without explicit indication.[1] Although all agree that hunting and fishing have historically been vital to the continued prosperity of the Klamath, the Court today assumes that the Klamath Tribe silently gave up its rights to hunt and fish on these lands in a 1901 Agreement, approved by Congress in 1906, that had no purpose other than to benefit the Tribe for a previous injustice. It reaches this conclusion even though there is no historical evidence that any party to the Agreement envisioned it as having the effect of altering tribal hunting and fishing practices, and even though hunting and fishing practices did not in fact change as a result of the Agreement. Although I agree that the boilerplate language of the Agreement can be read as the Court does, I also believe that such a reading is not necessary, ignores the Agreement's historical context, and is not faithful to the well-established principles that Indian treaties are to be interpreted as they were likely understood by the tribe and that doubts concerning the meaning of a treaty should be resolved in favor of the tribe.[2] Accordingly, I dissent.

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[1] See, *e. g.*, *United States* v. *Sioux Nation of Indians*, 448 U. S. 371, 422–423 (1980); *Menominee Tribe of Indians* v. *United States*, 391 U. S. 404 (1968); *Tulee* v. *Washington*, 315 U. S. 681 (1942).

[2] See *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 675–676 (1979); *Choctaw Nation* v. *Oklahoma*, 397 U. S. 620, 631 (1970); see also *Menominee Tribe of Indians* v. *United*

I

I will only briefly summarize the relevant history of the Klamath Reservation. As the Court explains, in 1864 the Klamath Tribe entered into a treaty with the United States whereby it agreed to settle on a reservation of 1.9 million acres in south central Oregon. Treaty of Oct. 14, 1864, 16 Stat. 707. This land was a small part of the 22 million acres of land to which the Klamath had held aboriginal title. As the Court points out: "The 1864 Treaty also provided that the [Klamath Tribe] would have . . . 'the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits.'" *Ante*, at 755. Although the borders of the reservation soon became the subject of some dispute, the purposes of the Treaty have always been clear. These purposes, and the importance of Indian hunting and fishing rights to their accomplishment, were well stated in a report to Congress by a Commission appointed to study the later boundary dispute:

> "It was evidently a principal object of the treaty to draw the Indians in from the large extent of territory over which they were roaming, subject to constant collisions with the steadily encroaching whites, and to concentrate them on an area much more limited, but which would still be ample to provide them with the means of subsistence.
>
> "To attain this, the marked tendency of the treaty and the emphatic testimony of the Indians seek to make all the boundaries mountain ridges, a purpose of which the nature of the country renders easy of accomplishment on all sides except the north.
>
> "There is no provision in the treaty, however, for the support of the Indians by the Government, and as the

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States, *supra*, at 413 (the intention to abrogate treaty rights is not to be lightly imputed to Congress).

high altitude and the severity of the climate are unfavorable to the cultivation of cereals, their subsistence depended upon natural products, consisting principally of game, fish, wild roots, and seeds. These mountain barriers, therefore, must include a territory frequented by game, streams stocked with fish, and ground producing the roots and seeds which formed so large a portion of the subsistence of the Indians." S. Doc. No. 93, 54th Cong., 2d Sess., 6–7 (1897) (Klamath Boundary Commission Report).

The boundaries of the reservation that was eventually established pursuant to the Treaty, however, contained only about two-thirds of the land promised the Klamath Tribe, and among the areas left outside the reservation were tribal hunting, fishing, and gathering grounds of substantial importance. These areas had been specifically included in the Treaty's definition of the planned reservation at the Tribe's insistence; but, as the result of an erroneous 1871 survey, over 617,000 acres of land promised to the Tribe were excluded from the newly established reservation. As a result of the erroneous survey and in violation of the Treaty, non-Indians began to enter on the land for stock grazing and, to a lesser extent, for settlement. See, *e. g.*, S. Exec. Doc. No. 129, 53d Cong., 2d Sess., 4–6, 8–9, 11, 17 (1894) (various documents noting grazing uses and relatively light settlement); see also n. 5, *infra*. The Klamath vehemently and repeatedly protested these entrances, but nevertheless continued to hunt and fish on the excluded land. See S. Doc. No. 93, *supra*, at 11, 15–16, 18. The protests continued for decades, and eventually led to Congress' establishment of a Boundary Commission to determine the proper boundaries of the reservation and to determine the value of the erroneously excluded land. Act of June 10, 1896, ch. 398, 29 Stat. 321, 342.

The Boundary Commission went to the reservation and interviewed large numbers of Klamath. Tribal elders all

insisted that they were sure that the disputed land was supposed to be in the reservation. They had explicitly demanded the land's inclusion in the 1864 Treaty, they explained, because of the land's traditional importance in the Tribe's essential hunting, fishing, and gathering activities. The Commissioners inspected the land and found a tribal fishing site upon which a stone dam had been constructed and maintained by the Tribe to aid in gathering large numbers of fish. The Commission concluded that the Klamath's complaints were largely justified and deserving of redress.[3]

The Commission determined, pursuant to the Tribe's desires, that redress would take the form of officially ceding the excluded land back to the United States for compensation, leaving the border of the reservation where it had been erroneously set. As the Court notes, however, the Commission determined the value of the excluded land with no reference to its use for hunting, fishing, or gathering—basing valuation on its use for timber and stock grazing. Yet the Commission knew the land's importance to the Tribe for hunting and fishing, since this was the basis of the Commission's finding that it had been erroneously excluded from the reservation. Similarly, during the course of the two years of negotiations toward an agreement, there was no reference to any cessation of hunting, fishing, or gathering activity on the land in question, nor, it is true, to the continuing of such activity. The

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[3] The Boundary Commission concluded its report as follows:

"In conclusion, we respectfully submit that during all this long period of thirty-two years these Indians have exhibited a patient and unwavering confidence in the justice of the Government demanding the highest commendation.

"Believing themselves to be grievously wronged by the white settlements on land they considered secured to them by solemn pledge of the Government and from which their subsistence was largely drawn, they yet endured all the aggravating conditions of these years, resisting all the allurements of the adjacent and kindred tribes during the [recent war] and remained loyal and true." S. Doc. No. 93, 54th Cong., 2d Sess., 11 (1897).

issue was simply never mentioned, and there is certainly no specific evidence that anyone, whether Klamath or Government official, envisioned that the Agreement would compel the Tribe to in any way alter the important hunting and fishing activities that it had been engaged in since the initial establishment of the reservation. During that time the Tribe had been forced to accept that others were entering and using the land, but the Tribe also had continued to fish and hunt as it always had done.

The Court is correct that the Tribe seemed fully satisfied with the possibility that the excluded land would be ceded to the United States for compensation, and there were no protests raised concerning loss of fishing, hunting, and gathering rights. *Ante*, at 759. But I cannot conclude from this silence that the Tribe understood and agreed to the extinguishing of hunting and fishing rights on the ceded land. *Ante*, at 770. Given the historical context of the 1901 Agreement, its proper interpretation is that, first, it compensated the Tribe for the fact that its position since the reservation's establishment had been less than the Tribe had been promised, and, second, it preserved the Tribe's position as it had actually existed since the erroneous survey. The Tribe's actual position between the erroneous survey and the 1901 Agreement included no ability to exercise exclusive possession of the erroneously excluded lands, although they had been promised that right in the 1864 Treaty; but the Tribe's position did include the ability to hunt and fish on those lands, and there is no reason to believe that a goal of the 1901 Agreement was to terminate such activities.

II

A

As the Court notes, the case focuses on two provisions of the 1901 Agreement. Article I of the Agreement contained a broad cession by the Tribe of "all their claim, right, title,

and interest in and to" the excluded land. 34 Stat. 367. In contrast, Article IV of the Agreement broadly declared that "nothing in [the] agreement shall be construed to deprive the said Klamath . . . of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement." Respondent and the courts below argued that the language of Article IV can reasonably be interpreted as a reservation by the Indians of a nonexclusive right to hunt and fish on those parts of the ceded land not in private hands.[4]

The Court rejects this construction of Article IV because of its unexplained insistence that the 1901 Agreement must be understood in terms of the structure of the 1864 Treaty, which envisioned no nonexclusive or off-reservation hunting rights. Indeed, as the Court emphasizes, a provision of the 1864 Treaty obligated the Tribe's members to remain on the reservation established by its terms. 16 Stat. 708. Thus, in the Court's view, because the reservation was diminished by the 1901 Agreement, and because the 1864 Treaty envisioned that the Tribe would hunt and fish only on its reservation, the 1901 Agreement must also have diminished the area where hunting and fishing rights existed. To allow nonexclusive

[4] As the Court notes, *ante*, at 764–765, n. 15, the Klamath claim a hunting and fishing right quite similar to the right of nonexclusive, off-reservation hunting and fishing expressly reserved by many of the Indians of the Pacific Northwest when they entered cession agreements. See *Puyallup Tribe* v. *Department of Game of Washington*, 391 U. S. 392 (1968); *United States* v. *Winans*, 198 U. S. 371 (1905). I would also agree with the Court that such a right is not an "absolute freedom from state regulation." See *ante*, at 765, n. 16. It should also be emphasized, however, that the right is nonetheless a valuable one, placing significant limits on permissible state regulation. See *Antoine* v. *Washington*, 420 U. S. 194, 207 (1975) (State must demonstrate that its regulation is a reasonable and necessary conservation measure and that its application to the Indians is necessary in the interest of conservation); see also *Department of Game of Washington* v. *Puyallup Tribe*, 414 U. S. 44 (1973); *Tulee* v. *Washington*, 315 U. S., at 684.

hunting and fishing rights on the ceded lands would, in the Court's view, create a "glaring inconsistency" with the 1864 Treaty, because to exercise such a right would have required the Tribe to leave the borders of its now-diminished reservation, in violation of the 1864 Treaty obligation to remain on reservation land. *Ante*, at 770.

B

This overly formal approach to treaty interpretation ignores the fundamental presumptions that Indian treaties are to be construed as the tribes would have understood them, *Choctaw Nation* v. *Oklahoma*, 397 U. S. 620, 631 (1970), and that ambiguities should be resolved in favor of the tribe. *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 675–676 (1979). I would have thought that an inquiry into the 1901 Agreement's meaning would focus, not primarily on the formal structure of the 1864 Treaty—leaving both documents abstracted from their actual purposes and historical contexts—but instead on the problems that arose since 1864 that gave rise to the need for the 1901 Agreement. Certainly, the latter approach is better suited to the goal of determining the purposes of the parties, and especially, to the goal of determining the understandings of the Tribe.

When looking at the 1901 Agreement in terms of its own historical setting, the evidence clearly supports two conclusions—first, that the Tribe had no expectation that it was losing its ability to continue those fishing and hunting practices that it had been pursuing from time immemorial on the ceded lands, and second, that the United States had no particular interest in terminating such fishing and hunting activities.

(1)

The Tribe's perspective is not difficult to divine. At the time of the 1901 Agreement, as well as at the time of the 1906

Act of Congress which ratified this Agreement, "[h]unting, fishing, gathering and trapping [were] crucial to the survival of the Klamath Indians." App. 19 (stipulated facts). The Tribe had received, under the 1864 Treaty, the right to hunt and fish on the specific lands that were ceded in the 1901 Agreement, and had received that right because it had insisted on the particular importance to the Tribe of its ability to hunt and fish on those specific lands. Although these lands had not been included within the erroneous borders of the original reservation, the Tribe nevertheless entered them to hunt and fish.

The 1864 Treaty had also granted the Tribe the exclusive right to possess the lands in question, and particularly prohibited the use of these lands by non-Indians. 16 Stat. 708. But the Tribe had never been able to exercise this right to exclude others. The erroneous boundaries had opened the lands to others; thus, the Tribe's ability to hunt and fish had become nonexclusive and its ability to exercise exclusive possession had disappeared. This was what it had lost, and accordingly, tribal members' complaints had focused only on the presence of non-Indians on their lands. They never asserted an interference with their ability to hunt and fish. It is clear that the Tribe envisioned the 1901 Agreement only as providing compensation for the loss that the Tribe had suffered. And there is certainly nothing in the record to indicate that the Agreement in any way was working a further loss on the Tribe. In this context, Article IV makes clear that the Tribe was not to lose any benefits that it had actually possessed as it entered the 1901 Agreement.

(2)

The United States' purposes were similarly clear, as the 1901 Agreement was entirely a result of Indian demands for the redress of an unfortunate mistake. The United States fully understood that the land in question was ill-suited for agriculture and settlement, and the record reflects no other

collateral purposes of Congress. Indeed, there is no evidence of any pressures on Congress from non-Indians urging the cession at issue.[5] There is simply no reason to believe that the United States—acting as trustee and seeking to compensate the Tribe for an unjust and accidental diminishment of their reservation—intended silently to effectuate a further diminution of tribal rights. We should not lightly assume that Congress, acting as a trustee of the Tribe's interests, wished to deprive the Tribe of access to food supplies that it might need and had always utilized.

It is likely that the United States' interests in 1901 had little to do with preserving the formal structure of the 1864 Treaty, an interest that the Court today assumes. Although the 1864 Treaty required the Tribe to stay on the land reserved to it by the Treaty, the alternative in 1864 was the Tribe's continued presence on over 22 million acres of land to which it held aboriginal title. The land on which the Tribe was to stay, although poor land for settlement, was known to contain game, fish, and vegetation in such quantities as to allow the Tribe to be self-sufficient with no reason to wander. By 1901, there was no longer an issue as to whether the Tribe would ever again wander over the 22 million acres they had once held under aboriginal title—the Klamath had fully accepted that they would remain on a much smaller area. But the issue of retaining the Tribe's self-sufficiency was still a concern.

In 1901, the Klamath were not viewed as hostile Indians, see n. 5, *infra*, and the surrounding land was minimally settled at best. For the United States to prohibit all tribal

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[5] As the Court points out, see *ante*, at 759–760, n. 8, the United States' first negotiator considered the excluded land "practically worthless" and believed that Congress should restore to the reservation the unentered excluded acreage rather than purchase it. The Tribe resisted this recommendation, preferring the compensated cession that was eventually accepted by Congress.

access to the ceded areas would have served no interest that the United States ever publicly declared, and it would have compromised the Klamath's ability to remain self-sufficient. It is thus unreasonable to believe that the United States, while purporting to act for the benefit of the Indians, placed a high priority on assuring that the Klamath be strictly confined to the now-diminished area of their reservation, even if that would mean less access to food. The United States' interests would have been fully served by reading the 1864 Treaty to require only that the Tribe not leave the area that was initially specified as the reservation. Article IV of the 1901 Agreement can thus easily be seen as an effort to preserve the Tribe's right to travel, hunt, and fish on the full area of *the original* reservation, so long as those activities are consistent with the Tribe's loss of exclusive possessory rights in the ceded lands. So long as the ceded lands were not opened to significant settlement, this resolution would fully serve what interest there still was in containing the Klamath and would not compromise the shared interest in continuing the Klamath's self-sufficiency.

(3)

This interpretation of the parties' perspectives fully conforms to what we know of the parties' subsequent behavior.[6] Congress never opened the ceded lands to settlement, and in fact, by the time it had ratified the 1901 Agreement, "[v]irtually all the land ceded by the Tribe was . . . closed to entry and placed in either national forests or parks." App. 13–14 (stipulated facts). No argument has been made that continued hunting and fishing by the Indians is incompatible with the land's uses. The Tribe's behavior is also fully consistent

[6]This Court has accepted that subsequent history of Indian lands can give "additional clue[s] as to what Congress expected would happen [with respect to] land on a particular reservation." *Solem* v. *Bartlett*, 465 U. S. 463, 472 (1984).

with its current interpretation of the Agreement. The parties have stipulated that the Tribe has in fact "continued to hunt, fish and trap on the excluded lands from the time of their cession to the present," *id.*, at 14 (stipulated facts). Thus, no subsequent behavior of the United States or of the Tribe reflects an expectation that the Tribe would alter its hunting and fishing patterns as a result of the cession.

(4)

Last, the 1901 Agreement's treatment of the issue of compensation also provides evidence that the parties did not envision that the Agreement denied the Klamath continued access to these traditional hunting and fishing grounds. The parties have stipulated that the Commission in no way considered the land's value for hunting or fishing when it calculated the proper compensation to the Tribe. *Id.*, at 12. Yet, the Commission was well aware that the land was a hunting and fishing ground of some importance to the Tribe. Similarly, when the Indian Claims Commission reviewed and supplemented the compensation awarded the Klamath—more than six decades after the ratification of the Agreement—it never assigned any value to hunting or fishing rights. *Id.*, at 14; see also *Klamath and Modoc Tribes* v. *United States*, 20 Ind. Cl. Comm'n 522 (1969). The silence of both these bodies is not surprising, if one accepts that the cession did not envision that Indian hunting and fishing would cease. We do not normally assume that the United States, without providing compensation, intended to deprive a tribe of valued hunting and fishing rights. *Menominee Tribe of Indians* v. *United States*, 391 U. S. 404, 413 (1968) (will not lightly assume that Congress meant to abrogate hunting and fishing rights without provision of compensation); cf. *United States* v. *Sioux Nation of Indians*, 448 U. S. 371, 422–424 (1980) (will not assume that compensation designed to ensure Tribe's survival after it gave up traditional

hunting activities was intended to cover both the taking of hunting rights and the taking of land). Nor should we lightly assume that the Tribe silently accepted the lack of specific compensation because its members understood that their valued hunting and fishing rights were merely incidental to land ownership.[7]

C

The analysis of the Agreement offered here is fully consistent with this Court's prior cases regarding Indian hunting and fishing rights. We have accepted that nonexclusive hunting and fishing rights have often existed independently from rights of exclusive possession of land. Thus, there have been many treaties in which Indians have explicitly reserved nonexclusive hunting and fishing rights while ceding the corresponding lands. See nn. 1 and 4, *supra*. Similarly, Congress has explicitly reserved to a Tribe continued hunting and fishing rights even after a reservation has been fully terminated. See, *e. g.*, 25 U. S. C. § 564m(b) (fishing rights explicitly reserved upon termination of Klamath Reservation in 1954); see also *Kimball* v. *Callahan*, 590 F. 2d 768, 772 (CA9), cert. denied, 444 U. S. 826 (1979). But most importantly, this Court has held that hunting and fishing rights can by implication survive the full termination of a reservation, even where the enactment terminating the reservation is written in broad language and makes no reference to those rights' survival. *Menominee Tribe of Indians* v. *United States*, *supra*.

In this case, as a result of the erroneous survey there was a *de facto* separation of the Klamath's hunting and fishing

[7] The Court speculates that the right to hunt and fish was simply not viewed by the Indians as a right separate from the right to possess the land. But the Indians clearly did value the hunting and fishing, and both before and after the 1901 Agreement, the Indians continued to hunt and fish without interference even though, during both periods, they knew that they did not exercise exclusive possession of the land. I decline to assume that the Indians were simply consciously violating the law.

rights from their rights of exclusive possession of the land. The former rights existed to the extent they could, consistent with the loss of the latter rights. In essence, the Tribe was left with off-reservation rights to hunt and fish on land from which it could not exclude others. The 1901 Agreement, which preserved to the Klamath all "benefits to which they are entitled under existing treaties, not inconsistent with the provisions of the [cession]," was not meant to take from them what was left of their right of access to their traditional hunting and fishing grounds.

III

In light of this Court's repeated statements that the abrogation of Indian rights should not be lightly inferred, and that treaties be interpreted as they would have been understood by the Indians, I find the Court's opinion today disturbing. Rather than follow the sort of historical inquiry that these canons should call for, the Court analyzes the case as one involving little more than the plain meaning of boilerplate language. It turns to history only to determine if its perceived "plain meaning" would be an impossible one. Ultimately, this produces a largely insensitive and conclusory historical inquiry that ignores how events almost certainly appeared to the Tribe.

The decision today represents another erroneous deprivation of the Klamath's tribal rights. The Court has offered no reason to believe the 1901 Agreement was designed to accomplish anything other than the redress of the wrong that had already been done to the Tribe. The Court has certainly offered no reason to believe that it was designed to effectuate a further diminution of the Klamath's rights.

I respectfully dissent.

CORNELIUS, ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT *v.* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-312. Argued February 19, 1985—Decided July 2, 1985

By Executive Order, participation in the Combined Federal Campaign (CFC), a charity drive aimed at federal employees, is limited to voluntary, tax-exempt, nonprofit charitable agencies that provide direct health and welfare services to individuals or their families, and legal defense and political advocacy organizations are specifically excluded. Participating organizations confine their fundraising activities to a 30-word statement submitted for inclusion in the CFC literature disseminated to federal employees. Undesignated contributions are distributed on a local level to certain participating organizations, and designated funds are paid directly to the specified recipient. Respondent legal defense and political advocacy organizations brought an action in Federal District Court challenging their exclusion under the Executive Order on the grounds, *inter alia*, that the denial of the right to seek designated funds violated their First Amendment right to solicit charitable contributions. The District Court granted summary judgment in respondents' favor and enjoined the denial of their pending or future applications to participate in the solicitation of designated contributions. The Court of Appeals affirmed on the ground that the Government restrictions in question were not reasonable.

Held:

1. Solicitation in the context of the CFC is speech protected by the First Amendment. The brief statements in the CFC literature directly advance the speaker's interest in informing readers about its existence and goals. Moreover, an employee's contribution in response to a request for funds functions as a general expression of support for the recipient and its views. Although the CFC does not entail direct discourse between the solicitor and the donor, the CFC literature facilitates the dissemination of views and ideas by directing employees to the soliciting agency to obtain more extensive information. And without the funds obtained from solicitation in various fora, the soliciting organization's continuing ability to communicate ideas and goals may be jeopardized. Pp. 797–799.

2. The CFC, rather than the federal workplace, is the relevant forum. Although as an initial matter a speaker must seek access to public property or to private property devoted to public use to evoke First Amend-

ment concerns, forum analysis is not completed merely by identifying the Government property at issue. Rather, in defining the forum, the focus should be on the access sought by the speaker. Here, respondents seek access to a particular means of communication, the CFC. And the CFC is a nonpublic forum. This conclusion is supported both by the Government's policy in creating the CFC to minimize the disturbance of federal employees while on duty formerly resulting from unlimited ad hoc solicitation activities and by the Government's practice of limiting access to the CFC to those organizations considered appropriate. Pp. 799–806.

3. The Government's reasons for excluding respondents from the CFC appear, at least facially, to satisfy the reasonableness standard. The Government's decision to restrict access to a nonpublic forum need only be *reasonable*, and the reasonableness must be assessed in the light of the purpose of the forum and all surrounding circumstances. Here, the President could reasonably conclude that a dollar directly spent on providing food and shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy. Moreover, avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum. Respondents' tax-exempt status does not determine the reasonableness of the Government's excluding them from the CFC. And the record supports an inference that respondents' participation in the CFC would be detrimental to the CFC and disruptive of the federal workplace. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose. Pp. 806–811.

4. Where the issue whether the Government impermissibly excluded respondents from the CFC because it disagreed with their viewpoints was neither decided below nor fully briefed before this Court, the issue will not be decided by this Court in the first instance, but respondents are free to pursue the issue on remand. Pp. 811–813.

234 U. S. App. D. C. 148, 727 F. 2d 1247, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 813. STEVENS, J., filed a dissenting opinion, *post*, p. 833. MARSHALL, J., took no part in the consideration or decision of the case. POWELL, J., took no part in the decision of the case.

Solicitor General Lee argued the cause for petitioner. With him on the briefs were *Acting Assistant Attorney*

General Willard, Deputy Solicitor General Geller, Carolyn F. Corwin, Paul Blankenstein, and *Joseph A. Morris.*

Charles Stephen Ralston argued the cause for respondents. With him on the brief were *Julius LeVonne Chambers, James M. Nabrit III, Stuart J. Land, Leonard H. Becker,* and *Boris Feldman.**

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the Federal Government violates the First Amendment when it excludes legal defense and political advocacy organizations from participation in the Combined Federal Campaign (CFC or Campaign), a charity drive aimed at federal employees. The United States District Court for the District of Columbia held that the respondent organizations could not be excluded from the CFC, and the Court of Appeals affirmed. 234 U. S. App. D. C. 148, 727 F. 2d 1247 (1984). We granted certiorari, 469 U. S. 929 (1984), and we now reverse.

I

The CFC is an annual charitable fundraising drive conducted in the federal workplace during working hours largely through the voluntary efforts of federal employees. At all times relevant to this litigation, participating organizations

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**Joseph B. Scott* and *Michael J. Kator* filed a brief for the United Black Fund of America et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of New York by *Robert Abrams,* Attorney General, *Robert Hermann,* Solicitor General, and *Daniel L. Kurtz, Pamela A. Mann,* and *Jill Laurie Goodman,* Assistant Attorneys General; for the American Civil Liberties Union Foundation by *E. Richard Larson, Burt Neuborne, Joseph M. Hassett,* and *Patricia A. Brannan;* for the American Jewish Committee et al. by *Samuel Rabinove* and *Richard T. Foltin;* and for the National Committee for Responsive Philanthropy, Independent Sector, et al. by *David C. Vladeck, Alan B. Morrison, John Cary Sims,* and *Adam Yarmolinsky.*

Dara Klassel, Eve W. Paul, and *Roger K. Evans* filed a brief for the Planned Parenthood Federation of America, Inc., as *amicus curiae.*

confined their fundraising activities to a 30-word statement submitted by them for inclusion in the Campaign literature.[1] Volunteer federal employees distribute to their coworkers literature describing the Campaign and the participants along with pledge cards. 5 CFR §§ 950.521(c) and (e) (1983). Contributions may take the form of either a payroll deduction or a lump-sum payment made to a designated agency or to the general Campaign fund. § 950.523. Undesignated contributions are distributed on the local level by a private umbrella organization to certain participating organizations. § 950.509(c)(5). Designated funds are paid directly to the specified recipient. Through the CFC, the Government employees contribute in excess of $100 million to charitable organizations each year. Brief for Petitioner 3.

The CFC is a relatively recent development. Prior to 1957, charitable solicitation in the federal workplace occurred on an ad hoc basis. Federal managers received requests from dozens of organizations seeking endorsements and the right to solicit contributions from federal employees at their worksites. U. S. Civil Service Commission, Manual on Fund-Raising Within the Federal Service for Voluntary Health and Welfare Agencies § 1.1 (1977) (Manual on Fund-Raising). In facilities where solicitation was permitted, weekly campaigns were commonplace. Executive Orders 12353 and 12404 As They Regulate the Combined Federal Campaign (Part 1), Hearing before the House Committee on

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[1] Effective September 17, 1984, the Office of Personnel Management (OPM) has revised its regulations in an effort to comply with the decisions below. See 49 Fed. Reg. 32735. The new regulations have changed the eligibility criteria at issue in this case and certain operational features of the Campaign. OPM expressly reserved the right to modify the rules in the event of a supervening direction by a court, Congress, or the President. *Ibid.* OPM's position before this Court is consistent with a desire to reinstate its prior regulations. Given these circumstances, the revision of the regulations at issue does not render this case moot. See *Maher* v. *Roe*, 432 U. S. 464, 468–469, n. 4 (1977).

Government Operations, 98th Cong., 1st Sess., 67–68 (1983). Because no systemwide regulations were in place to provide for orderly procedure, fundraising frequently consisted of passing an empty coffee can from employee to employee. *Id.*, at 68. Eventually, the increasing number of entities seeking access to federal buildings and the multiplicity of appeals disrupted the work environment and confused employees who were unfamiliar with the groups seeking contributions. *Ibid.*

In 1957, President Eisenhower established the forerunner of the Combined Federal Campaign to bring order to the solicitation process and to ensure truly voluntary giving by federal employees. Exec. Order No. 10728, 3 CFR 387 (1954–1958 Comp.). The Order established an advisory committee and set forth general procedures and standards for a uniform fundraising program. It permitted no more than three charitable solicitations annually and established a system requiring prior approval by a committee on fundraising for participation by "voluntary health and welfare" agencies. *Id.*, §§ 1(c) and 3(d). One of the principal goals of the plan was to minimize the disturbance of federal employees while on duty. *Id.*, § 1(d).

Four years after this initial effort, President Kennedy abolished the advisory committee and ordered the Chairman of the Civil Service Commission to oversee fundraising by "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate" in the solicitation of contributions from all federal employees. Exec. Order No. 10927, 3 CFR 454 (1959–1963 Comp.). From 1963 until 1982, the CFC was implemented by guidelines set forth in the Civil Service Commission's Manual on Fund-Raising. Only tax-exempt, nonprofit charitable organizations that were supported by contributions from the public and that provided direct health and welfare services to individuals were eligible to participate in the CFC. Manual on Fund-Raising § 5.21 (1977).

Respondents in this case are the NAACP Legal Defense and Educational Fund, Inc., the Sierra Club Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, the Federally Employed Women Legal Defense and Education Fund, the Indian Law Resource Center, the Lawyers' Committee for Civil Rights under Law, and the Natural Resources Defense Council. Each of the respondents attempts to influence public policy through one or more of the following means: political activity, advocacy, lobbying, or litigation on behalf of others. In 1980, two of the respondents—the NAACP Legal Defense and Educational Fund, Inc., and the Puerto Rican Legal Defense and Education Fund (the Legal Defense Funds)—joined by the NAACP Special Contribution Fund, for the first time sought to participate in the CFC. The Office of Personnel Management (OPM), which in 1978 had assumed the duties of the Civil Service Commission, refused admission to the Legal Defense Funds. This action led to a series of three lawsuits, the third of which is before us today.

In the first action the Legal Defense Funds challenged the "direct services" requirement on the grounds that it violated the First Amendment and the equal protection component of the Fifth Amendment. *NAACP Legal Defense & Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365 (DC 1981) *(NAACP I)*. The District Court did not reach the equal protection challenge, because it found that the "direct services" requirement as formulated in the Manual on Fund-Raising was too vague to satisfy the strict standards of specificity required by the First Amendment. *Id.*, at 1368. The Government did not appeal the District Court's decision, and the plaintiffs, along with other legal defense funds, were allowed to participate in the 1982 and 1983 Campaigns and receive funds designated for their use by federal employees.

In the second proceeding, the Legal Defense Funds challenged the decision of the Director of OPM to authorize local federal coordinating groups to determine what share, if any,

of the undesignated funds to allocate to organizations classified as national service associations. *NAACP Legal Defense & Educational Fund, Inc.* v. *Devine*, 560 F. Supp. 667, 672 (DC 1983) *(NAACP II)*. The plaintiff legal defense funds categorized themselves as "national service associations," a category that OPM had defined as agencies having a domestic welfare service function which includes direct services to meet basic human welfare needs. Manual on Fund-Raising § 4.2(e). The District Court rejected claims that OPM's decision, which essentially permitted local coordinating groups to choose not to allocate undesignated funds to the Legal Defense Funds, violated their rights under the Due Process Clause and the First Amendment. 560 F. Supp., at 676. The court found that local coordinating groups must have flexibility to distribute funds in accordance with the intent of donors and the benefit to the local community. Due process was satisfied by the participation of national service associations in the process by which the local groups determined how to distribute funds. *Id.*, at 675. The court determined that the exclusion was necessary to protect the First Amendment rights of donors not to contribute to organizations whose purposes were inconsistent with their beliefs and to serve the Government's interest in ensuring that as much money as possible was received through the Campaign. *Id.*, at 675–676. The Legal Defense Funds did not appeal the decision.

In response to the District Court's decision in *NAACP I*, President Reagan took several steps to restore the CFC to what he determined to be its original purpose. In 1982, the President issued Executive Order No. 12353, 3 CFR 139 (1983), to replace the 1961 Executive Order which had established the CFC. The new Order retained the original limitation to "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate," and delegated to the Director of the Office of Personnel Management the authority to establish criteria for determining appropriateness. Shortly thereafter, the President

amended Executive Order No. 12353 to specify the purposes of the CFC and to identify groups whose participation would be consistent with those purposes. Exec. Order No. 12404, 3 CFR 151 (1984). The CFC was designed to lessen the Government's burden in meeting human health and welfare needs by providing a convenient, nondisruptive channel for federal employees to contribute to nonpartisan agencies that directly serve those needs. *Id.*, § 1(b), amending Exec. Order No. 12353, § 2(b)(1). The Order limited participation to "voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families," *ibid.*, amending Exec. Order No. 12353, § 2(b)(2),[2] and specifically excluded those "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves." *Ibid.*, amending Exec. Order No. 12353, § 2(b)(3).

Respondents brought this action challenging their threatened exclusion under the new Executive Order. They argued that the denial of the right to seek designated funds violates their First Amendment right to solicit charitable contributions and that the denial of the right to participate in undesignated funds violates their rights under the equal pro-

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[2] "To meet [Campaign] objectives, eligibility for participation in the Combined Federal Campaign shall be limited to voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families. Such direct health and welfare services must be available to Federal employees in the local campaign solicitation area, unless they are rendered to needy persons overseas. Such services must directly benefit human beings, whether children, youth, adults, the aged, the ill and infirm, or the mentally or physically handicapped. Such services must consist of care, research or education in the fields of human health or social adjustment and rehabilitation; relief of victims of natural disasters and other emergencies; or assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and basic human welfare services." Exec. Order No. 12404, § 1(b), amending Exec. Order No. 12353, § 2(b)(2).

tection component of the Fifth Amendment. Respondents also contended that the "direct services" requirement in § 1(b) of the Executive Order suffered from the same vagueness problems as the requirement struck down in *NAACP I*. The District Court dismissed the vagueness challenge and the equal protection claim on ripeness grounds. *NAACP Legal Defense & Educational Fund, Inc.* v. *Devine*, 567 F. Supp. 401 (DC 1983) *(NAACP III)*. Those rulings were not appealed and are not before us. The District Court also held that respondents' exclusion from the designated contribution portion of the CFC was unconstitutional. The court reasoned that the CFC was a "limited public forum" and that respondents' exclusion was content based. *Id.*, at 407. Finding that the regulation was not narrowly drawn to support a compelling governmental interest, the District Court granted summary judgment to respondents and enjoined the denial of respondents' pending or future applications to participate in the solicitation of designated contributions. *Id.*, at 410.

The judgment was affirmed by a divided panel of the United States Court of Appeals for the District of Columbia Circuit. *NAACP Legal Defense & Educational Fund, Inc.* v. *Devine*, 234 U. S. App. D. C. 148, 727 F. 2d 1247 (1984). The majority did not decide whether the CFC was a limited public forum or a nonpublic forum under *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983), because in its view the Government restrictions were not reasonable and therefore failed even the least exacting scrutiny. The dissent disagreed with both the analysis used and the result reached by the majority. 234 U. S. App. D. C., at 169, 727 F. 2d, at 1268 (Starr, J., dissenting). The dissent defined the relevant forum as the federal workplace and found that it was a nonpublic forum under our cases. Based on this characterization, the dissent argued that the Government must merely provide a rational basis for the exclusion, and that this standard was met here. An equally divided court denied the Government's request for rehearing en banc. App. to Pet. for Cert. 80a.

II

The issue presented is whether respondents have a First Amendment right to solicit contributions that was violated by their exclusion from the CFC. To resolve this issue we must first decide whether solicitation in the context of the CFC is speech protected by the First Amendment, for, if it is not, we need go no further. Assuming that such solicitation is protected speech, we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic. Finally, we must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard. Applying this analysis, we find that respondents' solicitation is protected speech occurring in the context of a nonpublic forum and that the Government's reasons for excluding respondents from the CFC appear, at least facially, to satisfy the reasonableness standard. We express no opinion on the question whether petitioner's explanation is merely a pretext for viewpoint discrimination. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

A

Charitable solicitation of funds has been recognized by this Court as a form of protected speech. In *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980), the Court observed:

> "[S]oliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 761 (1976) . . . ." *Id.*, at 629.
>
> "Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps

> persuasive speech seeking support for particular causes or for particular views . . . and for the reality that without solicitation the flow of such information and advocacy would likely cease. . . . Furthermore, . . . , it has not been dealt with in our cases as a variety of purely commercial speech." *Id.*, at 632.

See also *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 363 (1977).

In *Village of Schaumburg*, the Court struck down a local ordinance prohibiting solicitation in a public forum by charitable organizations that expended less than 75 percent of the receipts collected for charitable purposes. The plaintiff in that case was a public advocacy group that employed canvassers to distribute literature and answer questions about the group's goals and activities as well as to solicit contributions. The Court found that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." 444 U. S., at 632. The ordinance was invalid, the Court held, because it unduly interfered with the exercise of protected rights.

Although *Village of Schaumburg* establishes that noncommercial solicitation is protected by the First Amendment, petitioner argues that solicitation within the confines of the CFC is entitled to a lesser degree of protection. This argument is premised on the inherent differences between the face-to-face solicitation involved in *Village of Schaumburg* and the 30-word written statements at issue here. In a face-to-face encounter there is a greater opportunity for the exchange of ideas and the propagation of views than is available in the CFC. The statements contained in the CFC literature are merely informative. Although prepared by the participants, the statements must conform to federal standards

which prohibit persuasive speech and the use of symbols "or other distractions" aimed at competing for the potential donor's attention. 5 CFR § 950.521(d) (1983).

Notwithstanding the significant distinctions between in-person solicitation and solicitation in the abbreviated context of the CFC, we find that the latter deserves First Amendment protection. The brief statements in the CFC literature directly advance the speaker's interest in informing readers about its existence and its goals. Moreover, an employee's contribution in response to a request for funds functions as a general expression of support for the recipient and its views. See *Buckley* v. *Valeo*, 424 U. S. 1, 21 (1976). Although the CFC does not entail direct discourse between the solicitor and the donor, the CFC literature facilitates the dissemination of views and ideas by directing employees to the soliciting agency to obtain more extensive information. 5 CFR § 950.521(e)(ii) (1983). Finally, without the funds obtained from solicitation in various fora, the organization's continuing ability to communicate its ideas and goals may be jeopardized. See *Village of Schaumburg* v. *Citizens for a Better Environment*, *supra*, at 632. Thus, the nexus between solicitation and the communication of information and advocacy of causes is present in the CFC as in other contexts. Although Government restrictions on the length and content of the request are relevant to ascertaining the Government's intent as to the nature of the forum created, they do not negate the finding that the request implicates interests protected by the First Amendment.

B

The conclusion that the solicitation which occurs in the CFC is protected speech merely begins our inquiry. Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government prop-

erty without regard to the nature of the property or to the disruption that might be caused by the speaker's activities. Cf. *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119, 136 (1977). Recognizing that the Government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated," *Greer* v. *Spock*, 424 U. S. 828, 836 (1976), the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum. Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. See *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S., at 45. Similarly, when the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest. Access to a nonpublic forum, however, can be restricted as long as the restrictions are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*, at 46.

To determine whether the First Amendment permits the Government to exclude respondents from the CFC, we must first decide whether the forum consists of the federal workplace, as petitioner contends, or the CFC, as respondents maintain. Having defined the relevant forum, we must then determine whether it is public or nonpublic in nature.

Petitioner contends that a First Amendment forum necessarily consists of tangible government property. Because the only "property" involved here is the federal workplace, in petitioner's view the workplace constitutes the relevant

forum. Under this analysis, the CFC is merely an activity that takes place in the federal workplace. Respondents, in contrast, argue that the forum should be defined in terms of the access sought by the speaker. Under their view, the particular channel of communication constitutes the forum for First Amendment purposes. Because respondents seek access only to the CFC and do not claim a general right to engage in face-to-face solicitation in the federal workplace, they contend that the relevant forum is the CFC and its attendant literature.

We agree with respondents that the relevant forum for our purposes is the CFC. Although petitioner is correct that as an initial matter a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. See, *e. g.*, *Greer* v. *Spock*, *supra*. In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property. For example, *Perry Education Assn.* v. *Perry Local Educators' Assn.*, *supra*, examined the access sought by the speaker and defined the forum as a school's internal mail system and the teachers' mailboxes, notwithstanding that an "internal mail system" lacks a physical situs. Similarly, in *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 300 (1974), where petitioners sought to compel the city to permit political advertising on city-owned buses, the Court treated the advertising spaces on the buses as the forum. Here, as in *Perry Education Assn.*, respondents seek access to a particular means of communication. Consistent with the approach taken in prior cases, we find that the CFC, rather than the federal workplace, is the forum. This conclusion does not mean,

however, that the Court will ignore the special nature and function of the federal workplace in evaluating the limits that may be imposed on an organization's right to participate in the CFC. See *Perry Education Assn.* v. *Perry Local Educators' Assn.*, *supra*, at 44.

Having identified the forum as the CFC, we must decide whether it is nonpublic or public in nature. Most relevant in this regard, of course, is *Perry Education Assn.* There the Court identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. Traditional public fora are those places which "by long tradition or by government fiat have been devoted to assembly and debate." 460 U. S., at 45. Public streets and parks fall into this category. See *Hague* v. *CIO*, 307 U. S. 496, 515 (1939). In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. *Perry Education Assn.*, *supra*, at 45 and 46, n. 7. Of course, the government "is not required to indefinitely retain the open character of the facility." *Id.*, at 46.

The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. *Ibid.* Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. *Ibid.* The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent. For example, in *Widmar* v. *Vincent*, 454 U. S. 263 (1981), we found that a state university that had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use. *Id.*, at 267. The policy evidenced a clear intent to create a public forum, not-

withstanding the University's erroneous conclusion that the Establishment Clause required the exclusion of groups meeting for religious purposes. Additionally, we noted that a university campus, at least as to its students, possesses many of the characteristics of a traditional public forum. *Id.*, at 267, n. 5. And in *Madison Joint School District* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167 (1976), the Court held that a forum for citizen involvement was created by a state statute providing for open school board meetings. *Id.*, at 174, n. 6. Similarly, the Court found a public forum where a municipal auditorium and a city-leased theater were designed for and dedicated to expressive activities. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 555 (1975).

Not every instrumentality used for communication, however, is a traditional public forum or a public forum by designation. *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 130, n. 6 (1981). "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Id.*, at 129. We will not find that a public forum has been created in the face of clear evidence of a contrary intent, see *ibid.*, nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity. See, *e. g.*, *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119 (1977). In *Perry Education Assn.*, we found that the School District's internal mail system was not a public forum. In contrast to the general access policy in *Widmar*, school board policy did not grant general access to the school mail system. The practice was to require permission from the individual school principal before access to the system to communicate with teachers was granted. Similarly, the evidence in *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974), revealed that the city intended to limit access to the advertising spaces on city transit buses. It had done so for 26 years, and

its management contract required the managing company to exercise control over the subject matter of the displays. *Id.*, at 299–300. Additionally, the Court found that the city's use of the property as a commercial enterprise was inconsistent with an intent to designate the car cards as a public forum. In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum. Accordingly, we have held that military reservations, *Greer* v. *Spock*, 424 U. S. 828 (1976), and jailhouse grounds, *Adderley* v. *Florida*, 385 U. S. 39 (1966), do not constitute public fora.

Here the parties agree that neither the CFC nor the federal workplace is a traditional public forum. Respondents argue, however, that the Government created a limited public forum for use by all charitable organizations to solicit funds from federal employees. Petitioner contends, and we agree, that neither its practice nor its policy is consistent with an intent to designate the CFC as a public forum open to all tax-exempt organizations. In 1980, an estimated 850,000 organizations qualified for tax-exempt status. H. Godfrey, Handbook on Tax Exempt Organizations 5 (1983). In contrast, only 237 organizations participated in the 1981 CFC of the National Capital Area. 1981 Combined Federal Campaign Contributor's Leaflet, National Capital Area. The Government's consistent policy has been to limit participation in the CFC to "appropriate" voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials. Although the record does not show how many organizations have been denied permission throughout the 24-year history of the CFC, there is no evidence suggesting that the granting of the requisite permission is merely ministerial. Cf. *Perry Education Assn.*, 460 U. S., at 47. The Civil Service Commission and, after 1978, the Office of Personnel Management developed extensive admission criteria to limit access to the Campaign to

those organizations considered appropriate. See Manual on Fund-Raising, ch. 5, and 5 CFR pt. 950 (1983). Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum. See *Greer* v. *Spock*, *supra*, at 838, n. 10.

Nor does the history of the CFC support a finding that the Government was motivated by an affirmative desire to provide an open forum for charitable solicitation in the federal workplace when it began the Campaign. The historical background indicates that the Campaign was designed to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation activities by *lessening* the amount of expressive activity occurring on federal property. Indeed, the OPM stringently limited expression to the 30-word statement included in the Campaign literature. The decision of the Government to limit access to the CFC is not dispositive in itself; instead, it is relevant for what it suggests about the Government's intent in creating the forum. The Government did not create the CFC for purposes of providing a forum for expressive activity. That such activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes. See *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, *supra*, at 130, n. 6, and cases cited therein.

An examination of the nature of the Government property involved strengthens the conclusion that the CFC is a nonpublic forum. Cf. *Greer* v. *Spock*, *supra*, at 838 ("[T]he business of a military installation [is] to train soldiers, not to provide a public forum"). The federal workplace, like any place of employment, exists to accomplish the business of the employer. Cf. *Connick* v. *Myers*, 461 U. S. 138, 150–151 (1983). "[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs." *Arnett* v. *Kennedy*, 416 U. S. 134, 168 (1974) (POWELL, J., concurring in part). It follows that the

Government has the right to exercise control over access to the federal workplace in order to avoid interruptions to the performance of the duties of its employees. Cf. *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S., at 128–129. In light of the Government policy in creating the CFC and its practice in limiting access, we conclude that the CFC is a nonpublic forum.

C

Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Perry Education Assn.*, *supra*, at 49. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, see *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974), or if he is not a member of the class of speakers for whose especial benefit the forum was created, see *Perry Education Assn.*, *supra*, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject. The Court of Appeals found it unnecessary to resolve whether the government's denial of access to respondents was viewpoint based, because it determined that respondents' exclusion was unreasonable in light of the purpose served by the CFC.

Petitioner maintains that the purpose of the CFC is to provide a means for traditional health and welfare charities to solicit contributions in the federal workplace, while at the same time maximizing private support of social programs that would otherwise have to be supported by Government funds and minimizing costs to the Federal Government by controlling the time that federal employees expend on the Campaign. Petitioner posits that excluding agencies that attempt to influence the outcome of political elections or the determination of public policy is reasonable in light of this

purpose. First, petitioner contends that there is likely to be a general consensus among employees that traditional health and welfare charities are worthwhile, as compared with the more diverse views concerning the goals of organizations like respondents. Limiting participation to widely accepted groups is likely to contribute significantly to employees' acceptance of the Campaign and consequently to its ultimate success. In addition, because the CFC is conducted largely through the efforts of federal employees during their working hours, any controversy surrounding the CFC would produce unwelcome disruption. Finally, the President determined that agencies seeking to affect the outcome of elections or the determination of public policy should be denied access to the CFC in order to avoid the reality and the appearance of Government favoritism or entanglement with particular viewpoints. In such circumstances, petitioner contends that the decision to deny access to such groups was reasonable.

In respondents' view, the reasonableness standard is satisfied only when there is some basic incompatibility between the communication at issue and the principal activity occurring on the Government property. Respondents contend that the purpose of the CFC is to permit solicitation by groups that provide health and welfare services. By permitting such solicitation to take place in the federal workplace, respondents maintain, the Government has concluded that such activity is consistent with the activities usually conducted there. Because respondents are seeking to solicit such contributions and their activities result in direct, tangible benefits to the groups they represent, the Government's attempt to exclude them is unreasonable. Respondents reject petitioner's justifications on the ground that they are unsupported by the record.

The Court of Appeals accepted the position advanced by respondents. When the excluded and included speakers share a similar "status," the court asserted that a heightened reasonableness inquiry is appropriate. Here the status of

respondents, in the court's view, is analogous to that of traditional health and welfare organizations, because both provide direct health and welfare services and are tax exempt under 26 U. S. C. §501(c)(3). 234 U. S. App. D. C., at 159, 727 F. 2d, at 1258. In such circumstances, the Court of Appeals believed that the Government's decision to exclude some speakers from the nonpublic forum is reasonable only if the exclusion furthers a legitimate Government interest and that interest adequately accounts for the differential treatment accorded the speakers. *Id.*, at 160, 727 F. 2d, at 1259.

Under this test, the Court of Appeals rejected petitioner's justifications as unreasonable. The court agreed that assistance to the needy is a laudable goal, but noted that respondents further this goal because their litigation efforts achieved direct benefits for many low-income persons. *Id.*, at 161, 727 F. 2d, at 1260. It also agreed that avoiding the appearance of federal support for partisan causes is a legitimate interest, but rejected it as a justification in this case because the Tax Code does not define legal defense funds as political advocacy groups. *Ibid.* Relying principally on public forum cases, the court declined to accept the rationale that exclusion could be premised on the Government's interest in minimizing disruption in the workplace and maximizing the success of the Campaign. *Id.*, at 162–163, 727 F. 2d, at 1261–1262.

Based on the present record, we disagree and conclude that respondents may be excluded from the CFC. The Court of Appeals' conclusion to the contrary fails to reflect the nature of a nonpublic forum. The Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated. Cf. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983); *Lehman* v. *City*

of Shaker Heights, 418 U. S. 298 (1974). Even if some incompatibility with general expressive activity were required, the CFC would meet the requirement because it would be administratively unmanageable if access could not be curtailed in a reasonable manner. Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling. The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message. See *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S., at 129. Rarely will a nonpublic forum provide the only means of contact with a particular audience. Here, as in *Perry Education Assn.*, *supra*, at 53–54, the speakers have access to alternative channels, including direct mail and in-person solicitation outside the workplace, to solicit contributions from federal employees.

The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances. Here the President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy. Moreover, avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum. See *Greer* v. *Spock*, 424 U. S., at 839; *Lehman* v. *City of Shaker Heights*, *supra*, at 304. In furthering this interest, the Government is not bound by decisions of other executive agencies made in other contexts. Thus, respondents' tax status, while perhaps relevant, does not determine the reasonableness of the Government's conclusion that participation by such agencies in the CFC will create the appearance of favoritism.

The Court of Appeals' rejection of the Government's interest in avoiding controversy that would disrupt the workplace and adversely affect the Campaign is inconsistent with our

prior cases. In *Perry Education Assn.*, *supra*, at 52, we noted that "exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools." Similarly, the exclusion of respondents may reasonably be considered a means of "insuring peace" in the federal workplace. Inasmuch as the Court of Appeals rejected this reason for lack of conclusive proof of an actual effect on the workplace, it ignored the teachings of this Court that the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum. 460 U. S., at 52, n. 12.

Finally, the record amply supports an inference that respondents' participation in the CFC jeopardized the success of the Campaign. OPM submitted a number of letters from federal employees and managers, as well as from Chairmen of local Federal Coordinating Committees and Members of Congress expressing concern about the inclusion of groups termed "political" or "nontraditional" in the CFC. More than 80 percent of this correspondence related requests that the CFC be restricted to "non-political," "non-advocacy," or "traditional" charitable organizations. Deposition of P. Kent Bailey, Program Analyst for OPM, App. 275, 276. In addition, OPM received approximately 1,450 telephone calls complaining about the inclusion of respondents and similar agencies in the 1983 Campaign. *Id.*, at 286. Many Campaign workers indicated that extra effort was required to persuade disgruntled employees to contribute. *Id.*, at 287. The evidence indicated that the number of contributors had declined in some areas. *Id.*, at 305. Other areas reported significant declines in the amount of contributions. See Executive Orders 12353 and 12404 as they Regulate the Combined Federal Campaign (Part 1), Hearing before the House Committee on Government Operations, 89th Cong., 1st Sess., 67 (1983) (statement of Donald J. Devine, Director, OPM). Thus, the record adequately supported petitioner's position that respondents' continued participation in the Campaign would be detrimental to the Campaign and disruptive of the federal

workplace. Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.

D

On this record, the Government's posited justifications for denying respondents access to the CFC appear to be reasonable in light of the purpose of the CFC. The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination. See *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S., at 49; cf. *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789 (1984). Although both the District Court and the Court of Appeals alluded to the argument that the Government excluded respondents in an attempt to suppress their points of view, neither court made a finding on the issue. The District Court erroneously characterized the CFC as a limited public forum and concluded that respondents' exclusion was impermissibly content based, because the statements in the CFC literature as to how the contributions would be used caused the controversy that ultimately led to respondents' exclusion. 567 F. Supp., at 407. The District Court, therefore, did not reach petitioner's argument that the exclusion was viewpoint neutral. *Ibid.* Also declining to decide the issue, the Court of Appeals suggested that respondents may have been excluded because petitioner simply disagreed with their viewpoints. 234 U. S. App. D. C., at 157, 160, n. 12, 727 F. 2d, at 1256, 1259, n. 12. The Court of Appeals found it unnecessary to resolve the issue, because it concluded that the exclusion was unreasonable.

Petitioner argues that a decision to exclude all advocacy groups, regardless of political or philosophical orientation, is

by definition viewpoint neutral. Brief for Petitioner 30. Exclusion of groups advocating the use of litigation is not viewpoint-based, petitioner asserts, because litigation is a means of promoting a viewpoint, not a viewpoint in itself. *Id.*, at 30–31, n. 23. While we accept the validity and reasonableness of the justifications offered by petitioner for excluding advocacy groups from the CFC, those justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view. Cf. *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S., at 634.

Petitioner contends that controversial groups must be eliminated from the CFC to avoid disruption and ensure the success of the Campaign. As noted *supra*, we agree that these are facially neutral and valid justifications for exclusion from the nonpublic forum created by the CFC. Nonetheless, the purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers. In addition, petitioner maintains that limiting CFC participation to organizations that provide direct health and welfare services to needy persons is necessary to achieve the goals of the CFC as set forth in Executive Order 12404. Although this concern is also sufficient to provide reasonable grounds for excluding certain groups from the CFC, respondents offered some evidence to cast doubt on its genuineness. Organizations that do not provide direct health and welfare services, such as the World Wildlife Fund, the Wilderness Society, and the United States Olympic Committee, have been permitted to participate in the CFC. App. 427–428. Although there is no requirement that regulations limiting access to a nonpublic forum must be precisely tailored, the issue whether the Government excluded respondents because it disagreed with their viewpoints was neither decided below nor fully briefed before this Court. We decline to decide in the first instance whether the exclusion of respondents was impermissibly motivated by

a desire to suppress a particular point of view. Respondents are free to pursue this contention on remand.

III

We conclude that the Government does not violate the First Amendment when it limits participation in the CFC in order to minimize disruption to the federal workplace, to ensure the success of the fundraising effort, or to avoid the appearance of political favoritism without regard to the viewpoint of the excluded groups. Accordingly, we reverse the judgment of the Court of Appeals that the exclusion of respondents was unreasonable, and we remand this case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL took no part in the consideration or decision of this case. JUSTICE POWELL took no part in the decision of this case.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

I agree with the Court that the Combined Federal Campaign (CFC) is not a traditional public forum. I also agree with the Court that our precedents indicate that the Government may create a "forum by designation" (or, to use the term our cases have adopted,[1] a "limited public forum") by allowing public property that traditionally has not been available for assembly and debate to be used as a place for expressive activity by certain speakers or about certain subjects. I cannot accept, however, the Court's circular reasoning that the CFC is not a limited public forum because the

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[1] See, *e. g.*, *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 48 (1983); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 655 (1981).

Government intended to limit the forum to a particular class of speakers. Nor can I agree with the Court's conclusion that distinctions the Government makes between speakers in defining the limits of a forum need not be narrowly tailored and necessary to achieve a compelling governmental interest. Finally, I would hold that the exclusion of the several respondents from the CFC was, on its face, viewpoint-based discrimination. Accordingly, I dissent.

I

The Court recognizes that its decisions regarding the right of a citizen to engage in expressive activity on public property generally have divided public property into three categories—public forums, limited public forums, and nonpublic forums. The Court also concedes, as it must, that "a public forum . . . created by government designation of a place or channel of communication for use by the public at large for assembly and speech, *for use by certain speakers*, or for the discussion of certain subjects" is a limited public forum. *Ante*, at 802 (emphasis added). It nevertheless goes on to find that the CFC is not a limited public forum precisely because the "Government's consistent policy has been to limit participation in the CFC" to certain speakers. *Ante*, at 804. Because the Government intended to exclude some speakers from the CFC, the Court continues, the Government may exclude any speaker from the CFC on any "reasonable" ground, except viewpoint discrimination. In essence, the Court today holds that the First Amendment's guarantee of free speech and assembly, a "fundamental principle of the American government," *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring), reduces to this: when the Government acts as the holder of public property other than streets, parks, and similar places, the Government may do whatever it reasonably intends to do, so long as it does not intend to suppress a particular viewpoint.

The Court's analysis transforms the First Amendment into a mere ban on viewpoint censorship, ignores the principles underlying the public forum doctrine, flies in the face of the decisions in which the Court has identified property as a limited public forum, and empties the limited-public-forum concept of all its meaning.

A

The public forum doctrine arose out of the Court's efforts to address the recurring and troublesome issue of when the First Amendment gives an individual or group the right to engage in expressive activity on government property. See, *e. g.*, *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983); *Widmar* v. *Vincent*, 454 U. S. 263 (1981); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975); *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969); *Brown* v. *Louisiana*, 383 U. S. 131 (1966); *Hague* v. *CIO*, 307 U. S. 496 (1939).

Access to government property can be crucially important to those who wish to exercise their First Amendment rights. Government property often provides the only space suitable for large gatherings, and it often attracts audiences that are otherwise difficult to reach. Access to government property permits the use of the less costly means of communication so "essential to the poorly financed causes of little people," *Martin* v. *Struthers*, 319 U. S. 141, 146 (1943), and "allow[s] challenge to governmental action at its locus." Cass, First Amendment Access to Government Facilities, 65 Va. L. Rev. 1287, 1288 (1979).

In addition to furthering the First Amendment rights of individuals, the use of government property for expressive activity helps further the interests that freedom of speech serves for society as a whole: it allows the "uninhibited, robust, and wide-open" debate about matters of public importance that secures an informed citizenry, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964); it permits "the

continued building of our politics and culture," *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 95–96 (1972); it facilitates political and societal changes through peaceful and lawful means, see *Carey* v. *Brown*, 447 U. S. 455, 467 (1980); and it helps to ensure that government is "responsive to the will of the people," *Stromberg* v. *California*, 283 U. S. 359, 369 (1931).

At the same time, however, expressive activity on government property may interfere with other important activities for which the property is used. Accordingly, in answering the question whether a person has a right to engage in expressive activity on government property, the Court has recognized that the person's right to speak and the interests that such speech serves for society as a whole must be balanced against the "other interests inhering in the uses to which the public property is normally put." *Adderley* v. *Florida*, 385 U. S. 39, 54 (1966) (dissenting opinion); see also *Carey* v. *Brown*, 447 U. S., at 470; *Cox* v. *New Hampshire*, 312 U. S. 569, 574 (1941).

The result of such balancing will depend, of course, upon the nature and strength of the various interests, which in turn depend upon such factors as the nature of the property, the relationship between the property and the message the speaker wishes to convey, and any special features of the forum that make it especially desirable or undesirable for the particular expressive activity. Broad generalizations about the proper balance are, for the most part, impossible. The Court has stated one firm guideline, however: the First Amendment does not guarantee that one may engage in expressive activity on government property when the expressive activity would be incompatible with important purposes of the property. *Grayned* v. *City of Rockford*, 408 U. S. 104, 116–117 (1972); see also *United States Postal Service* v. *Greenburgh Civic Assns.*, 453 U. S. 114, 130, n. 6 (1981); *Carey* v. *Brown*, 447 U. S., at 470; *Greer* v. *Spock*, 424 U. S. 828, 843 (1976) (POWELL, J., concurring).

In applying that principle, the Court has found that public places generally may be divided into three categories. The first, the "quintessential public forums," includes those places "which by long tradition or by government fiat have been devoted to assembly and debate," such as parks, streets, and sidewalks. *Perry*, 460 U. S., at 45; see also *United States* v. *Grace*, 461 U. S. 171, 177 (1983). In those places, expressive activity will rarely be incompatible with the intended use of the property, as is evident from the facts that they are "natural and proper places for dissemination of information and opinion," *Schneider* v. *State*, 308 U. S. 147, 163 (1939), and from "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U. S., at 515.

The second category, which we have referred to as "limited public forums," consists primarily of government property which the government has opened for use as a place for expressive activity for a limited amount of time, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 655 (1981), or for a limited class of speakers, *Widmar* v. *Vincent*, *supra*, or for a limited number of topics, *Madison Joint School District* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 175, n. 8 (1976). See *Perry*, 460 U. S., at 45–46, and n. 7. In a limited public forum, it is not history or tradition, but the government's own acquiescence in the use of the property as a forum for expressive activity that tells us that such activity is compatible with the uses to which the place is normally put.

In both public and limited public forums, because at least some types of expressive activity obviously are compatible with the normal uses of the property, the Court has recognized that people generally have a First Amendment right to engage in expressive activity upon the property. As noted above, however, the Court has observed that the right to engage in expressive activity on public property is not absolute,

and must be balanced against interests served by the other uses to which the property is put. Accordingly, the Court has held that the government may regulate the time, place, and manner of the expressive activity in order to accommodate the "interest of all" members of the public to enjoy the use of the public space, *Hague* v. *CIO*, 307 U. S., at 516, and in order to treat fairly all those who have an equal right to speak on the property. *Cox* v. *New Hampshire*, 312 U. S., at 574. Such restrictions must be "justified without reference to the content of the regulated speech," be "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication." *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984); *United States* v. *Grace*, 461 U. S., at 177; *Perry*, 460 U. S., at 45; *Heffron*, 452 U. S., at 647–648.

The Court has held that regulations other than time, place, and manner restrictions must be necessary to serve a compelling governmental interest and must be narrowly tailored to achieve that purpose. *Perry*, 460 U. S., at 45; see also *Carey* v. *Brown*, 447 U. S., at 465; *Police Department of Chicago* v. *Mosley*, 408 U. S., at 96–97. Again, however, because First Amendment rights must be "applied in light of the special characteristics of the . . . environment," *Tinker*, 393 U. S., at 506, the Court has recognized that a regulation that would not survive scrutiny if applied in the context of a public forum sometimes will be allowed in the context of a limited public forum. Restrictions based on the subject matter of the speech, for example, will almost never be justified in a public forum such as a park, but will more often be justified as necessary to reserve the limited public forum to expressive activity compatible with the property. See, *e. g.*, *Madison Joint School District*, 429 U. S., at 175, n. 8. In a traditional public forum, the government rarely could offer as a compelling interest the need to reserve the property for its normal uses, because expressive activity of all types traditionally has been a normal use of the property.

In a limited public forum, on the other hand, the need to confine expressive activity on the property to that which is compatible with the intended uses of the property will be a compelling interest that may justify distinctions made between speakers.

The third category, nonpublic forums, consists of property that is not compatible with general expressive activity. In those places, the government is not required to allow expressive activity. Of course, there often will be some such activity on the property by persons other than those, such as the government's own employees, who "belong" there. Some "outsiders" may be participants "in the forum's official business," and therefore may be allowed to use the property for expressive activity that furthers that business. See *Perry*, 460 U. S., at 53. Others may be provided access to the property by the government because it believes they will further the goals the government uses the property to serve. See, *e. g.*, *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119, 133 (1977). Distinctions between those speakers allowed access and those not allowed access must be viewpoint neutral, just as if the property were a traditional or limited public forum. *Perry*, 460 U. S., at 46. The Court has recognized, however, that reasonable and viewpoint-neutral distinctions between speakers that "relate to the special purpose for which the property is used" generally "are inherent and inescapable in the process of limiting the nonpublic forum to activities compatible with the intended purpose of the property." *Id.*, at 55, 49.

The line between limited public forums and nonpublic forums "may blur at the edges," and is really more in the nature of a continuum than a definite demarcation. Cf. *United States Postal Service* v. *Greenburg Civic Assns.*, 453 U. S., at 132 (the line between defining the forum and regulating the time, place, and manner of expressive activity in the forum blurs at the edges). The government may invite speakers to a nonpublic forum to an extent that the forum

comes to be a limited public forum because it becomes obvious that some types of expressive activity are not incompatible with the forum. For example, the fact that the Government occasionally may invite a speaker to a military base to lecture on drug abuse does not support the inference that it would be compatible with the purposes of the base to provide a forum for all speakers, or even for all those who wish to speak on drug abuse. *Greer* v. *Spock*, 424 U. S. 828 (1976). But if the base sponsored a drug abuse prevention day, and invited many organizations to set up displays or information booths, the claim of a similar, uninvited group that the Government had established a limited public forum would be on much firmer ground.

Further, the three categories are not exclusive. There are instances in which property has not traditionally been used for a particular form of expressive activity, and the government has not acquiesced, but the Court's examination of the nature of the forum and the nature of the expressive activity led it to conclude that the activity was compatible with normal uses of the property and was to be allowed. See, *e. g.*, *Brown* v. *Louisiana*, 383 U. S. 131, 142 (1966) (plurality opinion); *id.*, at 148 (BRENNAN, J., concurring in judgment); *id.*, at 150 (WHITE, J., concurring in result).

Thus, the public forum, limited-public-forum, and nonpublic forum categories are but analytical shorthand for the principles that have guided the Court's decisions regarding claims to access to public property for expressive activity. The interests served by the expressive activity must be balanced against the interests served by the uses for which the property was intended and the interests of all citizens to enjoy the property. Where an examination of all the relevant interests indicates that certain expressive activity is not compatible with the normal uses of the property, the First Amendment does not require the government to allow that activity.

The Court's analysis, it seems to me, turns these principles on end. Rather than recognize that a nonpublic forum is a

place where expressive activity would be incompatible with the purposes the property is intended to serve, the Court states that a nonpublic forum is a place where we need not even be concerned about whether expressive activity is incompatible with the purposes of the property. Rather than taking the nature of the property into account in balancing the First Amendment interests of the speaker and society's interests in freedom of speech against the interests served by reserving the property to its normal use, the Court simply labels the property and dispenses with the balancing.

The Court, of course, has recognized that the "First Amendment prohibits Congress from 'abridging freedom of speech, or of the press,' and its ramifications are not confined to the 'public forum.'" *United States Postal Service* v. *Greenburg Civic Assns.*, 453 U. S., at 131, n. 7. Nevertheless, it holds today that outside the "public forum," into which it collapses the limited-public-forum category, see *infra*, at 825, the constraint imposed upon the Government is nothing more than a rational-basis requirement. The Court offers no explanation why attaching the label "nonpublic forum" to particular property frees the Government of the more stringent constraints imposed by the First Amendment in other contexts. The Government's interests in being able to use the property for the purposes for which it was intended obviously are important; that is why a compatibility requirement is imposed. But the Government's interests as property holder are hardly more important than its interests as the keeper of our military forces, as guardian of our federal elections, as administrator of our prisons, as educator, or as employer. When the Government acts in those capacities, we closely scrutinize its justifications for infringements upon expressive activity. See, *e. g.*, *Wayte* v. *United States*, 470 U. S. 598, 611 (1985); *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976); *Procunier* v. *Martinez*, 416 U. S. 396, 413–414 (1974); *Healy* v. *James*, 408 U. S. 169 (1972); *Pickering* v. *Board of Education*, 391 U. S. 563

(1968); *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968). Similarly, the mere fact that the Government acts as property owner should not exempt it from the First Amendment.

Nor should tradition or governmental "designation" be completely determinative of the rights of a citizen to speak on public property. Many places that are natural sites for expressive activity have no long tradition of use for expressive activity. Airports, for example, are a relatively recent phenomenon, as are government-sponsored shopping centers. Other public places may have no history of expressive activity because only recently have they become associated with the issue that citizens wish to use the property to discuss. It is likely that the library in *Brown* v. *Louisiana*, *supra*, historically had not been used for demonstrations for the obvious reason that its association with the subject of segregation became a topic of public protest only during the civil rights movement.[2] Another reason a particular parcel of property may have little history of expressive use is that the Government has excluded expressive activity from the property unjustifiably. Cf. *United States* v. *Grace*, 461 U. S., at 180.

The guarantees of the First Amendment should not turn entirely on either an accident of history or the grace of the Government. Thus, the fact that the Government "owns" the property to which a citizen seeks access for expressive activity does not dispose of the First Amendment claim; it requires that we balance the First Amendment interests of those who seek access for expressive activity against the interests of the other users of the property and the interests served by reserving the property for its intended uses. The Court's analysis forsakes that balancing, and abandons the compatibility test that always has served as a threshold indicator of the proper balance.

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[2] See generally Note, A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property, 35 Stan. L. Rev. 121, 137 (1982).

B

Not only does the Court err in labeling the CFC a nonpublic forum without first engaging in a compatibility inquiry, but it errs as well in reasoning that the CFC is not a limited public forum because the Government permitted only "limited discourse," rather than "intentionally opening" the CFC for "public discourse." *Ante*, at 802. That reasoning is at odds with the cases in which the Court has found public property to be a limited public forum. Just as the Government's "consistent policy has been to limit participation in the CFC to 'appropriate' voluntary agencies and to require agencies seeking admission to obtain permission" from the relevant officials, *ante*, at 804, the theater in *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975), limited the use of its facilities to "clean, healthful entertainment which will make for the upbuilding of a better citizenship" and required productions wishing to use the theater to obtain permission of the relevant officials. See *id.*, at 549, n. 4. Under the Court's reasoning, therefore, the theater in *Southeastern Promotions* would not have been a limited public forum. Similarly, the university meeting rooms in *Widmar* v. *Vincent*, 454 U. S. 263 (1981), despite the Court's disclaimer, *ante*, at 802–803, would not have been a limited public forum by the Court's reasoning, because the University had a policy of "selective access" whereby only registered nonreligious student groups, not religious student groups or the public at large, were allowed to meet in the rooms.[3]

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[3] Other cases in which this Court has found that the First Amendment prohibited regulations restricting expressive activity in a public place also are inexplicable under the Court's analysis. By the Court's reasoning, there would have been no basis for the holding in *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969), that the First Amendment protects the right of high school students to wear armbands protesting the "hostilities in Vietnam." *Id.*, at 504. Schools have never been identified as "quintessential public forums" like parks, and they practice a policy of selective access, because they are not open to students

Nor does the Court's reasoning find support in those cases where the Court has rejected the claim that a particular property was a limited public forum. In *Perry*, for example, the Court assumed, *arguendo*, that by allowing groups such as the Cub Scouts to use its mail system, the school might have created a limited public forum for such organizations, even though the school clearly had no intent to open up the mail system for general "public discourse." 460 U. S., at 48. In *Greer* v. *Spock*, the Court stated that the fact that the military base had decided that lectures on drug abuse would be "supportive of the military mission . . . did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever." 424 U. S., at 838, n. 10. In his concurring opinion in that case, JUSTICE POWELL made clear that this conclusion followed from the principle that the Court had to examine whether there was a "functional and symbolic incompatibility" between the particular expressive activity at issue and the "'specialized society separate from civilian society' . . . that has its home on the base." *Id.*, at 844, quoting *Parker* v. *Levy*, 417 U. S. 733, 743 (1974).

Finally, in *Jones* v. *North Carolina Prisoners' Labor Union*, in rejecting the claim that the grant of access to the Jaycees and Alcoholics Anonymous transformed a prison into a public forum, the Court again did not look merely to whether that grant of access indicated an intent to open the prison "for public discourse." Instead, it engaged in an explicit balancing of the various interests involved, and, relying particularly on the special deference due the informed discretion of prison officials, concluded that "[t]here is nothing in the Constitution which requires prison officials to treat all inmate groups alike where differentiation [between those

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and nonstudents alike. Under the Court's analysis, it would follow that "a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated." *Ante*, at 808. But *Tinker* required precisely such a showing of incompatibility. 393 U. S., at 509.

allowed access and those denied access] is necessary to avoid an imminent threat of institutional disruption or violence." 433 U. S., at 136.

C

The Court's analysis empties the limited-public-forum concept of meaning and collapses the three categories of public forum, limited public forum, and nonpublic forum into two. The Court makes it *virtually* impossible to prove that a forum restricted to a particular class of speakers is a limited public forum. If the Government does not create a limited public forum unless it intends to provide an "open forum" for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum, *ante*, at 804–805, no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum. The very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis that fact alone would demonstrate that the forum is not a limited public forum.

Further, the Court today explicitly redefines a limited public forum as a place which the Government intentionally opens "for public discourse." *Ante*, at 802. But traditional public forums are "places which by long tradition or *by government fiat* have been devoted to assembly and debate." *Perry*, 460 U. S., at 45 (emphasis added). I fail to see how the Court's new definition of limited public forums distinguishes them from public forums.

II

A

The Court's strained efforts to avoid recognizing that the CFC is a limited public forum obscure the real issue in this case: what constraint does the First Amendment impose upon the Government's efforts to define the boundaries of a limited public forum? While I do not agree with the Court

that the Government's consistent policy has been to limit access to the CFC to "traditional" charities through "extensive" eligibility criteria, the Government did indeed adopt eligibility criteria in 1983 specifically designed to exclude respondents. Exec. Order No. 12404, 3 CFR 151 (1984). Accordingly, the central question presented is whether those criteria need be anything more than rational.

The Court has said that access to a limited public forum extends only to "other entities of similar character." *Perry*, 460 U. S., at 48. It never has indicated, however, that the First Amendment imposes no limits on the government's power to define which speakers are of "similar character" to those already allowed access. Obviously, if the government's ability to define the boundaries of a limited public forum is unconstrained, the limited-public-forum concept is meaningless. Under that reasoning, the defendants in *Widmar* v. *Vincent*, 454 U. S. 263 (1981), would have been allowed to define the University's meeting places as limited to speakers of similar character to "nonreligious" groups; the defendants in *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975) would have been allowed to define their theater as limited to plays of similar character to "clean, healthful entertainment"; and the school board in *Madison Joint School District* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167 (1976), would have been allowed to limit discussion of labor matters to persons similar in character to union representatives.

The constraints the First Amendment imposes upon the government's definition of the boundaries of a limited public forum follow from the principles underlying the public and limited-public-forum doctrine. As noted, the government's acquiescence in the use of property for expressive activity indicates that at least some expressive activity is compatible with the intended uses of the public property. If the government draws the boundaries of the forum to exclude expressive activity that is incompatible with the property, and to

include that which is compatible, the boundaries will reflect precisely the balancing of interests the public forum doctrine was meant to encapsulate. If the government draws the line at a point which excludes speech that would be compatible with the intended uses of the property, however, then the government must explain how its exclusion of compatible speech is necessary to serve, and is narrowly tailored to serve, some compelling governmental interest other than preserving the property for its intended uses.

B

Petitioner does not even argue that the Government's exclusion of respondents from the CFC served any compelling governmental interest; she argues merely that the exclusion was "reasonable." The Court also implicitly concedes that the justifications petitioner offers would not meet anything more than the minimal "reasonable basis" scrutiny. *Ante*, at 808–809. I agree that petitioner's justifications for excluding respondents neither reserve the CFC for expressive activity compatible with the property nor serve any other compelling governmental interest.

The Court would point to three "justifications" for the exclusion of respondents. First, the Court states that "the President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy." *Ante*, at 809. I fail to see how the President's view of the relative benefits obtained by various charitable activities translates into a compelling governmental interest. The Government may have a compelling interest in increasing charitable contributions because charities provide services that the Government otherwise would have to provide. But that interest does not justify the exclusion of respondents, for respondents work to enforce the rights of minorities, women, and others through litigation, a task that various Government agencies otherwise might be called upon to undertake.

In any event, the fact that the President or his advisers may believe the money is best "directly spent on providing food or shelter to the needy" starkly fails to explain why respondents are excluded from the CFC while other groups that do not spend money to provide food or shelter directly to the needy are allowed to be included.[4] Of the 237 groups included in the 1981–1982 CFC for the National Capital Area, only 61, or 26%, provide food, shelter, residential care, or information and referral services related to food or housing, according to the descriptions contained in the Contributor's Leaflet. Indeed, in the past few years, the CFC for the National Capital Area has included many groups that have absolutely nothing to do with the provision of food or shelter or other basic needs.[5]

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[4] Nor does petitioner's argument that money is best spent on providing food and shelter directly to those in need explain why groups that provide legal aid services that are not limited to a particular "kind of cause, claim, or defense," see 5 CFR § 950.101(a)(1)(i)(H) (1984), are admitted while respondents are not, or why groups that provide assistance related to custody disputes and related legal problems, see 1981 Contributor's Leaflet (description of International Social Service, American Branch), are admitted while respondents are not.

[5] During the 1981–1982 Campaign year, groups allowed to participate in the CFC for the National Capital Area included Close-up, "An alternative means of political education structured to teach high school students about government while providing opportunities for involvement to aid in deciding political futures"; The Rep, Incorporated, which "Provides a forum for training and educating writers, actors, theatrical directors and other theatre craftsmen"; African Heritage Dancers and Drummers, "A community arts organization designed to give students and area residents a greater appreciation of traditional African arts, dance and music"; D. C. Striders, "An organization of promising high school athletes which provides structured programs for field and track competitors"; the District of Columbia Music Center, which "Provides the opportunity for understanding and appreciation of the Fine Arts through study and performance"; and the Howard Theatre Foundation, which "Preserves the cultural legacy of the Howard Theatre." Those groups may well provide most worthwhile services, but their inclusion in the CFC is difficult to square with the Government's purported conclusion that charitable contributions are best spent

The Court next states that "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum." *Ante*, at 809. The Court, however, flatly has rejected that justification in the context of limited public forums. *Widmar* v. *Vincent*, 454 U. S., at 274. In addition, petitioner's proffered justification again fails to explain why respondents are excluded when other groups, such as the National Right to Life Educational Trust Fund and Planned Parenthood, at least one of which the Government presumably would wish to avoid the appearance of supporting, are allowed to participate. And petitioner offers no explanation why a simple disclaimer in the brochure would not suffice to achieve the Government's interest in avoiding the appearance of support.

Nor is the Government's "interest in avoiding controversy" a compelling state interest that would justify the exclusion of respondents. The managers of the theater in *Southeastern Promotions* no doubt thought the exclusion of the rock musical Hair was necessary to avoid controversy, see 420 U. S., at 563–564 (Douglas, J., dissenting in part and concurring in result in part); and the school officials in *Tinker* thought their exclusion of students protesting the activities of the United States in Vietnam was necessary to avoid controversy, see 393 U. S., at 509–510. Yet in those cases, both of which involved limited public forums, the Court did not accept the mere avoidance of controversy as a compelling governmental interest. Rather, the Court in *Tinker* held that in order to justify the exclusion of particular expressive activity, the government "must be able to show that its action was caused by something more than a mere desire to avoid the discom-

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providing food or shelter to the needy. Petitioner would explain all these inconsistencies by saying that at times the Government may have misapplied its own eligibility criteria. Brief for Petitioner 49. If the Government is truly concerned that money be spent directly on food and shelter for the needy, it is strange that it could have misapplied its criteria almost 75% of the time.

fort and unpleasantness that always accompany an unpopular viewpoint." 393 U. S., at 509. The government instead must show that the excluded speech would "'materially and substantially interfere'" with the other activities for which the public property was intended. *Ibid.*, quoting *Burnside* v. *Byars*, 363 F. 2d 744, 749 (CA5 1966); see also *Cox* v. *Louisiana*, 379 U. S. 536, 551 (1965); *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949).

No such showing has been made here. As the Court of Appeals noted, the record completely fails to support any assertion that the "controversy" threatened to interfere with the purposes of the federal workplace. The Court admits that the avoidance of controversy in the forum itself is not a valid ground for restricting speech in a public forum, *ante*, at 811, and the same rule governs limited public forums. The fact that the CFC is limited to a particular class of speakers does not mean that it is not dedicated to "the free exchange of ideas." *Ibid.* A central purpose of the CFC obviously is to give federal employees the opportunity to choose among the charities that meet legitimate eligibility criteria, and the free exchange of ideas about which of those causes one should support is not to be infringed merely because a vocal minority does not wish to devote their charitable dollars to a particular charity.

Further, even if the avoidance of controversy in the forum itself could ever serve as a legitimate governmental purpose, the record here does not support a finding that the inclusion of respondents in the CFC threatened a material and substantial disruption. In fact, the evidence shows that contributions to the CFC increased during each of the years respondents participated in the Campaign. See Brief for Respondents 34 and sources cited therein. The "hundreds" of phone calls and letters expressing a preference that groups other than "traditional" charities be excluded from the CFC reflect nothing more than the discomfort that can be expected whenever a change is made, and whenever any opin-

ion is expressed on a topic of concern to the huge force in 1983 of some 2.7 million civilian federal employees.[6] The letters objecting to the inclusion of respondents in the Campaign must be considered against the fact that many federal employees obviously supported their inclusion in the CFC, as is evidenced by the substantial contributions respondents received through the Campaign.

It is true that unions organized boycotts of the CFC in some areas because of their opposition to the participation in the CFC of the National Right to Work Legal Defense and Education Fund, and that, in those areas, contributions sometimes declined. But the evidence also showed that after some initial confusion regarding whether the organization the unions found objectionable was receiving undesignated contributions, the major unions urged their members simply to designate their contributions so that none went to that group. Further, apparently recognizing that its exclusion of all respondents merely because they share one characteristic with the organization that generated controversy is hardly a narrowly tailored exclusion, petitioner steadfastly maintains that the Government does not claim a right to exclude individual groups in "response to objections from federal employees"; petitioner claims instead that the Government has a right to "differentiate among broad categories of organizations, based on various reasons, including the belief that inclusion of organizations in one category is more likely to engender controversy among federal employees and to jeopardize the success of the Campaign because of the nature of the activities of those organizations." Reply Brief for Petitioner 14, n. 11. *Tinker* made clear that the exclusion of expressive activity must be based on more than such "undifferentiated fear or apprehension of disturbance." 393 U. S., at 508.

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[6] Bureau of the Census, Statistical Abstract of the United States 322 (1985).

III

Even if I were to agree with the Court's determination that the CFC is a nonpublic forum, or even if I thought that the Government's exclusion of respondents from the CFC was necessary and narrowly tailored to serve a compelling governmental interest, I still would disagree with the Court's disposition, because I think the eligibility criteria, which exclude charities that "seek to influence . . . the determination of public policy," Executive Order No. 12404, 3 CFR 152 (1984), is on its face viewpoint based. Petitioner contends that the criteria are viewpoint neutral because they apply equally to all "advocacy" groups regardless of their "political or philosophical leanings." Brief for Petitioner 30. The relevant comparison, however, is not between the individual organizations that make up the group excluded, but between those organizations allowed access to the CFC and those denied such access.

By devoting its resources to a particular activity, a charity expresses a view about the manner in which charitable goals can best be achieved. Charities working toward the same broad goal, such as "improved health," may have a variety of views about the path to that goal. Some of the "health services" charities participating in the 1982 National Capital Area CFC, for example, obviously believe that they can best achieve "improved health care" through medical research; others obviously believe that their resources are better spent on public education; others focus their energies on detection programs; and still others believe the goal is best achieved through direct care for the sick. Those of the respondents concerned with the goal of improved health, on the other hand, obviously think that the best way to achieve that goal is by changing social policy, creating new rights for various groups in society, or enforcing existing rights through litigation, lobbying, and political activism. That view cannot be communicated through the CFC, according to the Govern-

ment's eligibility criteria. Instead, Government employees may hear only from those charities that think that charitable goals can best be achieved within the confines of existing social policy and the status quo. The distinction is blatantly viewpoint based, so I see no reason to remand for a determination of whether the eligibility criteria are a "facade" for viewpoint-based discrimination.

I would affirm the judgment of the Court of Appeals.

JUSTICE STEVENS, dissenting.

The scholarly debate between JUSTICE O'CONNOR and JUSTICE BLACKMUN concerning the categories of public and quasi-public fora is an appropriate sequel to many of the First Amendment cases decided during the past decade.[1] As is true of the Court's multitiered analysis of equal protection cases, however, I am somewhat skeptical about the value of this analytical approach in the actual decisional process. See *Cleburne* v. *Cleburne Living Center*, *ante*, at 451–454 (STEVENS, J., concurring). At least in this case, I do not find the precise characterization of the forum particularly helpful in reaching a decision.

Everyone on the Court agrees that the exclusion of "advocacy" groups from the Combined Federal Campaign (CFC) is prohibited by the First Amendment if it is motivated by a bias against the views of the excluded groups. Moreover, everyone also recognizes that the evidence in the record

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[1] As two commentators noted:

"Public forum analysis appears to be increasing in importance. The doctrine traces back to a famous dictum of Justice Roberts and received further attention from Professor Kalven almost twenty years ago, but it was almost never used in Supreme Court opinions until recently. The phrase 'public forum' has appeared in only thirty-two Supreme Court decisions. Only two of these decisions were rendered prior to 1970 and thirteen of the thirty-two have been in the 1980's." Farber & Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va. L. Rev. 1219, 1221–1222 (1984) (footnotes omitted).

gives rise to at least an inference that "the purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers." *Ante*, at 812; see also *ante*, at 832 (BLACKMUN, J., dissenting).[2] The problem presented by the case is whether that inference is strong enough to support the entry of a summary judgment in favor of respondents.

Today the Court decides to remand the case for a trial to determine whether the exclusion of respondents was the product of viewpoint discrimination. *Ante*, at 797, 812–813. That decision is supported by the rule that forecloses the entry of a summary judgment when a genuine issue of fact is present, and by the special limitations on this Court's ability to undertake its own review of trial records. Cf. *United States* v. *Hasting*, 461 U. S. 499, 516–519 (1983) (STEVENS, J., concurring in judgment). Nevertheless, my study of the case has persuaded me that the Court of Appeals correctly affirmed the entry of summary judgment in favor of respondents.

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[2] It is worth noting that the Government has advanced a series of different arguments for the result that it has sought during the course of this controversy. See *NAACP Legal Defense & Educational Fund* v. *Devine*, 234 U. S. App. D. C. 148, 152, 727 F. 2d 1247, 1251 (1984) (that the legal defense funds did not provide "direct services"); *id.*, at 153, 727 F. 2d, at 1252 (that the legal defense funds sought to influence public policy by litigating on behalf of persons other than themselves); *id.*, at 154, 727 F. 2d, at 1253 (employee objections and boycotts); *ibid.* (placing the fundraising objective in jeopardy); *ibid.* (the improper use of taxpayer resources to raise funds for advocacy organizations and political education groups); *ibid.* (undue burden because of the large number of organizations in the CFC); *id.*, at 155, 727 F. 2d, at 1254 ("[T]he CFC does not involve solicitation by the participating charities, and is more accurately described as a 'subsidy' by the Federal Government"); *id.*, at 160, 727 F. 2d, at 1259 (that the CFC is limited to those organizations that assist the needy); *id.*, at 161, 727 F. 2d, at 1260 (that the Government should not appear to favor "political advocacy groups"); *id.*, at 162, 727 F. 2d, at 1261 (that inclusion would be "controversial"); *id.*, at 166, 727 F. 2d, at 1265 (that alternative fora are available).

As the District Court found, "the CFC provides employees with two ways in which to make contributions . . . . An employee may designate that his donations be distributed to particular organizations participating in the CFC. Alternatively, if the employee does not designate any agency to benefit from the donation, the amount contributed is placed into a pool which is divided among the approved agencies in accordance with a formula set forth in the regulations." *NAACP Legal Defense & Educational Fund, Inc.* v. *Devine*, 567 F. Supp. 401, 406 (DC 1983).

This case does not involve the general pool that is supported by *undesignated* contributions. Brief for Petitioner 11; Brief for Respondents 6. Respondents do not participate in that pool and do not receive, or seek to receive, any share of the federal employees' undesignated contributions. Instead, respondents receive only those CFC contributions that are specifically designated to go to them. To phrase it in another manner, respondents only benefit from contributions that are the result of the free and voluntary choices of federal employees who make specific designations. Those federal employees who merely support the undesignated CFC fund, as well as those who designate other charities, provide no support for respondents.

I emphasize this fact because the arguments advanced in support of the exclusion might well be sufficient to justify an exclusion from the general fund, but have manifestly less force as applied to designated contributions. Indeed, largely for the reasons that JUSTICE BLACKMUN has set forth in Parts II–B and III of his opinion, the arguments advanced in support of the exclusion are so plainly without merit that they actually lend support to an inference of bias.[3]

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[3] In expressing this opinion, I do not intend to suggest that the author of the regulation was motivated by a conscious prejudice against advocacy groups. A subconscious bias, based on nothing more than a habitual attitude of disfavor, or perhaps a willingness to assume that frequent

I am persuaded that each of the three reasons advanced in support of denying advocacy groups a right to participate in a request for *designated* contributions is wholly without merit. The Government's desire to have its workers contribute to charities that directly provide food and shelter rather than to those that do not surely cannot justify an exclusion of some but not other charities that do not do so. Moreover, any suggestion that the Government might be perceived as favoring every participant in the solicitation is belied by the diversity of the participants and by the fact that there has been no need to disclaim what must be perfectly obvious to the presumptively intelligent federal worker. Last, the supposed fear of controversy in the workplace is pure nonsense—one might as well prohibit discussions of politics, recent judicial decisions, or sporting events.[4] In sum, the reasoning set forth in Parts II–B and III of JUSTICE BLACKMUN's dissenting opinion persuades me that the judgment should be affirmed.

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expressions of disagreement with the achievements of advocacy groups adequately demonstrate that they are somehow inferior to "traditional health and welfare charities," may provide the actual explanation for a regulation that is honestly, but incorrectly, believed to be "viewpoint neutral." "For a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification." *Mathews* v. *Lucas*, 427 U. S. 495, 520 (1976) (STEVENS, J., dissenting).

[4] Expressions of affection for the Dallas Cowboys would surely be forbidden in all federal offices located in the District of Columbia if the avoidance-of-controversy rationale were valid.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 836 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JULY 1 THROUGH OCTOBER 2, 1985

JULY 1, 1985

Dismissal Under Rule 53

No. 84-545. HICO INDEPENDENT SCHOOL DISTRICT ET AL. *v.* WELLS ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 736 F. 2d 243.

Appeals Dismissed

No. 84-1591. BOUDREAUX *v.* GRICE. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 462 So. 2d 131.

No. 84-6755. BURY *v.* CITY OF LAKELAND, FLORIDA, ET AL. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 84-494. NATIONAL LABOR RELATIONS BOARD *v.* MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115, ET AL.; and

No. 84-528. LAPINSKI ET AL. *v.* MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115, ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Pattern Makers* v. *NLRB*, *ante*, p. 95. Reported below: 725 F. 2d 1212.

No. 84-1324. ADAMS ET AL. *v.* JASINSKI. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985). Reported below: 745 F. 2d 70.

No. 84-1756. CITY OF SHEPHERDSVILLE, KENTUCKY, ET AL. *v.* RYMER. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Oklahoma City* v. *Tuttle*, 471 U. S. 808 (1985). Reported below: 754 F. 2d 198.

Miscellaneous Orders

No. A–869 (84–6868). VALENTINO *v.* SUPERIOR COURT OF THE COUNTY OF CONTRA COSTA. Ct. App. Cal., 1st App. Dist. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–928. PUGH *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–935 (84–1244). DAVIS ET AL. *v.* BANDEMER ET AL. D. C. S. D. Ind. [Probable jurisdiction noted, 470 U. S. 1083.] Application for stay of the December 13, 1984, order of the United States District Court for the Southern District of Indiana, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

No. A–944. FABER ET AL. *v.* FARGNOLI ET AL. Application for stay of the order of the Appellate Division, Supreme Court of New York, Third Judicial Department, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–972 (84–1923). HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* NEW YORK ET AL. C. A. 2d Cir. Application for a partial stay of the judgment of the United States District Court for the Eastern District of New York, case No. CV–83–0457, as set forth in the order of January 31, 1984, presented to JUSTICE MARSHALL, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

No. D–490. IN RE DISBARMENT OF HOLTZMAN. Disbarment entered. [For earlier order herein, see 471 U. S. 1063.]

No. 92, Orig. ARKANSAS *v.* MISSISSIPPI. Request of the Special Master for award of costs and compensation granted, and he is awarded a total of $32,110.74 to be divided equally by the parties. The Special Master is hereby discharged. [For earlier decision herein, see, *e. g.*, 471 U. S. 377.]

No. 82–1889. SPRINGFIELD TOWNSHIP SCHOOL DISTRICT ET AL. *v.* KNOLL, 471 U. S. 288. Motion of respondent to retax costs

granted and the parties are to bear their own costs. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 83–2004. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* ZENITH RADIO CORP. ET AL. C. A. 3d Cir. [Certiorari granted, 471 U. S. 1002.] Motion of petitioners to dispense with printing the joint appendix granted and counsel shall file with the Clerk nine copies of the record that was before the United States Court of Appeals for the Third Circuit. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 84–1531. MICHIGAN *v.* JACKSON. Sup. Ct. Mich. [Certiorari granted, 471 U. S. 1124.] Motion for appointment of counsel granted, and it is ordered that James Krogsrud, Esquire, of Detroit, Mich., be appointed to serve as counsel for respondent in this case.

No. 84–1539. MICHIGAN *v.* BLADEL. Sup. Ct. Mich. [Certiorari granted, 471 U. S. 1124.] Motion for appointment of counsel granted, and it is ordered that Ronald J. Bretz, Esquire, of Lansing, Mich., be appointed to serve as counsel for respondent in this case.

No. 84–1745. SCHILLING, COMMISSIONER OF SAVINGS AND LOAN ASSOCIATIONS FOR ILLINOIS *v.* TELEGRAPH SAVINGS & LOAN ASSOCIATION OF CHICAGO ET AL. Sup. Ct. Ill.; and

No. 84–1747. SHOULTZ *v.* MONFORT OF COLORADO, INC., ET AL. C. A. 10th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

Probable Jurisdiction Noted

No. 84–1803. ATTORNEY GENERAL OF NEW YORK *v.* SOTO-LOPEZ ET AL. Appeal from C. A. 2d Cir. Probable jurisdiction noted. Reported below: 755 F. 2d 266.

Certiorari Granted

No. 84–1725. UNITED STATES *v.* CITY OF FULTON ET AL. C. A. Fed. Cir. Certiorari granted. Reported below: 751 F. 2d 1255.

No. 84–1554. SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS *v.* CARRIER. C. A. 4th Cir. Motion of respondent

for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 754 F. 2d 520.

No. 84–1737. UNITED STATES *v.* AMERICAN COLLEGE OF PHYSICIANS. C. A. Fed. Cir. Motion of American Business Press for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 743 F. 2d 1570.

No. 84–6807. LEE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 129 Ill. App. 3d 1167, 491 N. E. 2d 1391.

Certiorari Denied. (See also No. 84–6755, *supra.*)

No. 83–421. CONSOLIDATED X-RAY SERVICE CORP. *v.* BUGHER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 705 F. 2d 1426.

No. 84–636. BROWN, CONSERVATOR OF BRISCOE *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 362.

No. 84–677. AMERICAN WAREHOUSEMEN'S ASSN. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL.;

No. 84–684. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL.;

No. 84–691. INTERNATIONAL ASSOCIATION OF NVOCCS ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.;

No. 84–696. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL.; and

No. 84–869. HOUFF TRANSFER, INC. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 966.

No. 84–1256. HECKMANN ET AL. *v.* CEMETERIES ASSOCIATION OF GREATER CHICAGO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 451, 468 N. E. 2d 1354.

No. 84–1372. THOMASSEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 84–1444. PRICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 363.

No. 84–1463. WILSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 453 So. 2d 413.

No. 84–1566. CHRISTOFFERSEN ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 749 F. 2d 513.

No. 84–1617. ALABAMA PUBLIC SERVICE COMMISSION *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 2d 883.

No. 84–1665. CAMPBELL *v.* WASHINGTON STATE BAR ASSN. C. A. 9th Cir. Certiorari denied.

No. 84–1676. PLUECKHAHN *v.* FARMERS INSURANCE EXCHANGE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 749 F. 2d 241.

No. 84–1684. ALLIED CORP. *v.* DISTRICT 17, UNITED MINE WORKERS OF AMERICA, ET AL.; and

No. 84–1863. DISTRICT 17, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* ALLIED CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 765 F. 2d 412.

No. 84–1693. FLORIDA *v.* CRUZ; and FLORIDA *v.* HOLLIDAY ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 465 So. 2d 516 (first case); 465 So. 2d 524 (second case).

No. 84–1708. OKLAHOMA PUBLISHING CO. *v.* OKLAHOMA HOSPITAL ASSN. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 748 F. 2d 1421.

No. 84–1718. CRABTREE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 1200.

No. 84–1722. PORT PACKET CORP. *v.* LEWIS ET AL.; and

No. 84–1723. LEWIS ET AL. *v.* PORT PACKET CORP. Sup. Ct. Va. Certiorari denied. Reported below: 229 Va. 1, 325 S. E. 2d 713.

No. 84–1730. MONTGOMERY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1175, 481 N. E. 2d 368.

No. 84–1739. ALTAMONT FARMS, INC., ET AL. *v.* RIOS ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 792, 476 N. E. 2d 312.

No. 84-1743. BELLETIRE, DIRECTOR, DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES, ET AL. *v.* PARKS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1397.

No. 84-1749. ARMSTRONG, TRUSTEE OF THE ESTATE OF GELKING *v.* STATE BANK OF TOWNER. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 778.

No. 84-1754. CAVANAGH *v.* GOLDBERG, JUDGE, RHODE ISLAND FAMILY COURT, ET AL. C. A. 1st Cir. Certiorari denied.

No. 84-1755. MODELL *v.* GRIES SPORTS ENTERPRISES, INC., ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 15 Ohio St. 3d 284, 473 N. E. 2d 807.

No. 84-1757. HELLMAN *v.* UNIVERSITY OF PITTSBURGH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 257.

No. 84-1758. DURANTE BROS. & SONS, INC. *v.* NATIONAL BANK OF NEW YORK CITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 239.

No. 84-1760. CANALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 84-1767. KONZEN *v.* KONZEN. Sup. Ct. Wash. Certiorari denied. Reported below: 103 Wash. 2d 470, 693 P. 2d 97.

No. 84-1782. SMYTHE, CRAMER CO. ET AL. *v.* SMITH ET UX. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 180.

No. 84-1786. WELENKEN HIMMELFARB & CO. ET AL. *v.* HOLT, AKA ATCHISON. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 652.

No. 84-1787. BOWERS *v.* CONTINENTAL INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 753 F. 2d 1574.

No. 84-1789. SIMON ET AL. *v.* CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1083.

No. 84-6351. SOLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 930.

No. 84–6384. THOMAS *v.* KADISH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 276.

No. 84–6398. HARGRAVE *v.* LANDON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 379.

No. 84–6432. FULTON ET AL. *v.* COLLINS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 744 F. 2d 1026.

No. 84–6452. LECROY *v.* FLORIDA; and
No. 84–6475. LECROY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 461 So. 2d 88.

No. 84–6469. GAST *v.* YOUNG, WARDEN. Sup. Ct. Wis. Certiorari denied. Reported below: 122 Wis. 2d 785, 367 N. W. 2d 224.

No. 84–6500. RODGERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 755 F. 2d 533.

No. 84–6544. REDDICK *v.* CALLAHAN, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied.

No. 84–6578. SLOANE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 174.

No. 84–6610. RANDOLPH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 463 So. 2d 186.

No. 84–6631. SIMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 1239.

No. 84–6706. AVERY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 887, 476 N. E. 2d 1010.

No. 84–6710. ALSTON *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 156.

No. 84–6747. REED *v.* WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1291.

No. 83–2076. POLLARD *v.* BOARD OF POLICE COMMISSIONERS ET AL. Sup. Ct. Mo. Certiorari denied. JUSTICE BRENNAN,

JUSTICE MARSHALL, and JUSTICE POWELL would grant certiorari. Reported below: 665 S. W. 2d 333.

No. 84-761. DATA GENERAL CORP. *v.* DIGIDYNE CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 1336.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

Petitioner in this case manufactured and sold a central processing unit for computers known as NOVA. Petitioner also created and sold a copyrighted operating system for NOVA called RDOS. RDOS was a very popular operating system, but petitioner's licensing agreement prevented customers from using it with any central processing unit other than petitioner's NOVA.

Respondents sued, claiming that petitioner's marketing strategy amounted to an illegal tie-in in violation of the antitrust laws. After a jury trial, the District Court granted petitioner's motion for a judgment notwithstanding the verdict, defining the appropriate market as the "market for general purpose minicomputers and microprocessors." *In re Data General Corp. Antitrust Litigation*, 529 F. Supp. 801, 821 (ND Cal. 1981). No reasonable juror could find, the court determined, that within this large and dynamic market with much larger competitors petitioner had the market power to restrain trade through an illegal tie-in arrangement. The Court of Appeals for the Ninth Circuit reversed and reinstated the jury verdict in favor of respondents. 734 F. 2d 1336 (1984). The court concluded that the tying arrangement was illegal *per se*, because petitioner's RDOS operating system was sufficiently unique and desirable to an appreciable number of buyers to enable petitioner to force those consumers to buy its tied product, the NOVA central processing unit.

The Court of Appeals' decision in this case is suspect on several grounds. As we have consistently explained, a particular tying arrangement may have procompetitive justifications, and it is thus inappropriate to condemn such an arrangement without considerable market analysis. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 104, n. 26 (1984); *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U. S. 2, 11-14 (1984). Anticompetitive forcing only exists if consumers are forced to buy a tied product as a result of the

sellers' market power, not simply because of the desirability of the package. *Id.*, at 24–25. The Court of Appeals looked to market power over "locked in" customers who had already purchased petitioner's wares, viewed the copyright on the operating system as creating a presumption of market power, and seemingly concluded that forcing power is sufficiently established to demonstrate *per se* antitrust liability if some buyers find the tying product unique and desirable.

Drawing distinctions between the permissible and the forbidden in this area is difficult, and the posture of this case—a jury verdict overturned by the District Court but reinstated on appeal—creates an additional layer of complexity, since each court below took a different view of what facts were relevant. Nonetheless, this case raises several substantial questions of antitrust law and policy, including what constitutes forcing power in the absence of a large share of the general market, whether market power over "locked in" customers must be analyzed at the outset of the original decision to purchase, and what effect should be given to the existence of a copyright or other legal monopoly in determining market power.

At stake is more than the resolution of this single controversy or even the clarification of what may seem at times to be a collection of arcane legal distinctions. In the highly competitive, multibillion dollar a year computer industry, bundling of software and hardware, or of operating systems and central processing units, is somewhat common, and any differentiated product is especially attractive to some buyers. The reach of the decision in this case is potentially enormous, and as the United States strongly urges us to do, I would grant certiorari to address the substantial issues of federal law presented.

No. 84–1230. CITY OF NORTH MUSKEGON ET AL. *v.* BRIGGS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 746 F. 2d 1475.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

In 1977, respondent Briggs, then a married police officer separated from his wife, maintained an intimate relationship with a woman married to another man, and moved into an apartment

with her. After this living arrangement was brought to the attention of the Police Chief, respondent was suspended from the Police Department for conduct unbecoming an officer. When respondent continued his conduct, he was informed that it violated state law, and he was discharged. The disciplinary sanctions were upheld by petitioner city's City Council.

Respondent sued, claiming that his discharge amounted to an unlawful violation of his civil rights. 563 F. Supp. 585 (WD Mich. 1984). The District Court and Court of Appeals for the Sixth Circuit rejected the argument that respondent's activities were prohibited by state statutes forbidding adultery and lewd and lascivious cohabitation. Those courts also found that respondent's fundamental right of sexual privacy was infringed. Respondent was awarded $35,000 in compensatory damages, and this award was upheld on appeal. 746 F. 2d 1475 (1984).

The decision below stands in marked contrast to that issued by another Federal Court of Appeals. In *Shawgo* v. *Spradlin*, 701 F. 2d 470 (1983), cert. denied *sub nom. Whisenhunt* v. *Spradlin*, 464 U. S. 965 (1983), the Fifth Circuit held that unmarried police officers could be disciplined for cohabiting with each other. Despite that in *Shawgo* there was no allegation of violation of state law, the Court of Appeals there ruled that any right to privacy implicated was qualified and was overridden by the governmental interests at stake in running a police department.

The difference between the approaches of these two federal courts is evidence of a broader disagreement over whether extramarital sexual activity, including allegedly unlawful adulterous activity, is constitutionally protected in a way that forbids public employers to discipline employees who engage in such activity. Compare, *e. g.*, *Baron* v. *Meloni*, 556 F. Supp. 796 (WDNY 1983); *Suddarth* v. *Slane*, 539 F. Supp. 612 (WD Va. 1982); *Johnson* v. *San Jacinto Junior College*, 498 F. Supp. 555 (SD Tex. 1980), with *Baker* v. *Wade*, 553 F. Supp. 1121, 1140 (ND Tex. 1982); *New York* v. *Onofre*, 51 N. Y. 2d 476, 487, 415 N. E. 2d 936, 940 (1980), cert. denied, 451 U. S. 987 (1981); *Drake* v. *Covington County Board of Education*, 371 F. Supp. 974, 978–979 (MD Ala. 1974) (three-judge court).

This case presents an important issue of constitutional law regarding the contours of the right of privacy afforded individuals for sexual matters. It is an issue over which courts are divided, and I would grant certiorari to address it squarely.

No. 84–1677. GREEN BAY PACKAGING, INC. *v.* ADAMS EXTRACT CO. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari to resolve a conflict between the decisions of the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Fifth Circuit. Reported below: 752 F. 2d 137.

No. 84–1720. HOLDING *v.* SOVRAN BANK, EXECUTOR AND TRUSTEE OF THE ESTATE OF MUSE. Sup. Ct. Va. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 84–1734. JOHNSON *v.* PENNSYLVANIA STATE UNIVERSITY ET AL. C. A. 3d Cir. Motion of Student Association of the State University of New York et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 752 F. 2d 854.

No. 84–1741. BOWEN *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 84–6700. STAFFORD *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 84–6714. CARTWRIGHT *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 84–6728. INGRAM *v.* GEORGIA. Sup. Ct. Ga.; and
No. 84–6808. MILLS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 84–1741, 715 P. 2d 1093; No. 84–6700, 697 P. 2d 165; No. 84–6714, 695 P. 2d 548; No. 84–6728, 253 Ga. 622, 323 S. E. 2d 801; No. 84–6808, 462 So. 2d 1075.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 84–6447. TEAGUE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 680 S. W. 2d 785.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

At the sentencing stage of a capital proceeding, Tennessee requires a capital defendant to prove that any mitigating circum-

stances he has established outweigh any aggravating circumstances the State has proved. State law provides:

> "If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances the sentence *shall* be death." Tenn. Code Ann. § 39–2–203(g) (1982) (emphasis added).

Sentencing juries are instructed that the defendant's failure to carry this burden requires automatic imposition of a death sentence. As the State Supreme Court has held: "[I]f the State does prove an aggravating circumstance beyond a reasonable doubt, then unless the jury finds that mitigation exists and outweighs the aggravating circumstance, it can only impose the death penalty." *State* v. *Melson*, 638 S. W. 2d 342, 366 (Tenn. 1982), cert. denied, 459 U. S. 1137 (1983). The jury in this case was so instructed.

I continue to believe such instructions and statutes are inconsistent with the Court's Eighth Amendment precedents.* They impermissibly suggest to the jury a more limited role than the Eighth Amendment requires it to play. A jury must always be free to confront the ultimate question whether "'death is the appropriate punishment'" in the specific case, even where mitigating factors do not outweigh aggravating factors. *Lockett* v. *Ohio*, 438 U. S. 586, 601 (1978) (plurality opinion) (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.)). The jury may wish to vote for life out of a desire to render mercy, or it may believe that the death penalty is simply inappropriate for the specific crime the defendant has committed. These factors are properly part of the sentencing process. "[T]he sentencing process must permit consideration of the 'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'"

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*See *White* v. *Maryland*, 470 U. S. 1062 (1985) (dissenting from denial of certiorari); *Maxwell* v. *Pennsylvania*, 469 U. S. 971 (1984) (dissenting from denial of certiorari); *Stebbing* v. *Maryland*, 469 U. S. 900 (1984) (dissenting from denial of certiorari); *Jones* v. *Illinois*, 464 U. S. 920 (1983); *King* v. *Mississippi*, 461 U. S. 919 (1983) (dissenting from denial of certiorari); see also *Smith* v. *North Carolina*, 459 U. S. 1056 (1982) (STEVENS, J., respecting denial of certiorari).

Lockett, *supra*, at 60 (quoting *Woodson*, *supra*, at 304). See also *Roberts* v. *Louisiana*, 431 U. S. 633, 637 (1977).

Tennessee's statute appears to write less quantifiable mitigating factors, such as the desire to render mercy, out of the sentencing proceeding. Because the statute is likely to mislead sentencing juries into believing that only mitigating factors they can label and "weigh" against aggravating ones can properly be considered, I would grant certiorari to review the statute's constitutionality. I therefore dissent.

No. 84–6473. GONZALEZ-MARES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 752 F. 2d 1485.

No. 84–6520. DAVIS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 461 So. 2d 67.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner was charged with the brutal beating and shooting of a woman and her two young daughters in Duval County, Florida. The murders and petitioner's arrest were the subject of enormous pretrial publicity in the Duval County area. The major local newspapers carried numerous stories on the crime and the details of petitioner's arrest, and many minutes of prime-time news coverage were devoted to the subject. Among the specific and prejudicial facts disclosed by this pretrial publicity were that petitioner had failed a lie detector test, that he had a history of violent crime, that he was on parole at the time of his arrest, that he had admitted being in the victim's home around the time of the murders, and that particular pieces of evidence appeared to link petitioner to the crimes.

Based on the substantial showing of prejudicial pretrial publicity he had made, petitioner moved for a change of venue. Attached to this motion were affidavits from 15 Duval County attorneys who believed the extent and nature of the pretrial publicity would make it impossible for petitioner to receive a fair and impartial jury in Duval County. Petitioner also moved for individual and sequestered *voir dire*, and the trial judge deferred ruling on the change-of-venue motion until after *voir dire* was completed. During *voir dire*, at least 10 of the 40 veniremen admitted having prior knowledge about the case. The trial judge, however, re-

fused to allow these jurors to be questioned individually and, as a result, defense counsel was precluded from learning the specific information they had heard or read. To have pursued such a line of questioning in front of the entire jury pool undoubtedly would have contaminated the remainder of the venire. After the group *voir dire*, the trial court denied the change-of-venue motion. Four of the veniremen who admitted to prior knowledge of the case ultimately sat on the jury that convicted petitioner and sentenced him to death.

Petitioner argues that the refusal to grant individual *voir dire* in the circumstances of this case violated his Sixth Amendment right to a fair and impartial jury. I recognize that "exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged [does not] alone presumptively depriv[e] the defendant of due process." *Murphy* v. *Florida*, 421 U. S. 794, 799 (1975). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin* v. *Dowd*, 366 U. S. 717, 723 (1961). The question here, however, is not whether the jury actually was biased against petitioner, but whether he was unconstitutionally deprived of the opportunity to uncover such bias and to exercise his for-cause challenges to root it out. The right to an impartial jury encompasses the right to take reasonable steps designed to insure that the jury is impartial. See, *e. g.*, *Groppi* v. *Wisconsin*, 400 U. S. 505 (1971); *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966); *Aldridge* v. *United States*, 283 U. S. 308 (1931); see also *Ham* v. *South Carolina*, 409 U. S. 524, 532 (1973) (opinion of MARSHALL, J.). Moreover, the informed exercise of jury challenges is an essential element in insuring jury impartiality. Indeed, the first Justice Harlan, speaking for a unanimous Court, called the right to challenge "one of the most important of the rights secured to the accused" and concluded that "[a]ny system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Pointer* v. *United States*, 151 U. S. 396, 408 (1894); see also *Lewis* v. *United States*, 146 U. S. 370, 376 (1892); *Johnson* v. *Louisiana*, 406 U. S. 356, 379 (1972) (opinion of POWELL, J.).

This Court has not addressed whether, and upon what threshold showing, individual *voir dire* is constitutionally required to guarantee a defendant's right to "have sufficient information brought out on voir dire to enable him to exercise his challenges in a rea-

sonably intelligent manner." *United States* v. *Rucker*, 557 F. 2d 1046, 1048 (CA4 1977). Members of the Court, however, have urged that individual *voir dire* may be required to ferret out the damaging effect of pretrial publicity. *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 602 (1976) (BRENNAN, J., concurring in judgment). Moreover, lower courts have concluded that this practice is constitutionally required under circumstances similar to those presented here. In *United States* v. *Davis*, 583 F. 2d 190, 196 (CA5 1978), the court held that "where the nature of the publicity as a whole raised a significant possibility of prejudice," due process required more than general questions to the venire as a group regarding their ability to render an impartial verdict. The court found the extensive pretrial publicity potentially prejudicial on the basis of the "sensational nature of some of the reports" and disclosure of the arrest and conviction records of the defendants. *Ibid.* See also *United States* v. *Hawkins*, 658 F. 2d 279 (CA5 1981). Similarly, the Louisiana Supreme Court, apparently relying on the Federal Constitution, see *Michigan* v. *Long*, 463 U. S. 1032 (1983), ordered individual *voir dire* when pretrial publicity had disclosed the defendant's confession and had linked him to a series of highly publicized crimes. See generally ABA Standards for Criminal Justice 8–3.5 (2d ed. 1980) (recommending individual *voir dire* when substantial possibility that potentially prejudicial material will make jurors ineligible to serve).

In this case, there can be little doubt of the extensive publicity the triple murder and petitioner's arrest received. Much of this information was prejudicial. Four members of the petit jury acknowledged their exposure to at least some of this material, but because the trial judge denied individual *voir dire*, defense counsel was effectively precluded from learning the nature of their pretrial knowledge or its potential effect on their impartiality, and from intelligently exercising his challenges. Apparently viewing petitioner's constitutional claim as one of state law only, the State Supreme Court concluded in a short paragraph that the refusal to grant individual *voir dire* was not an "abuse of discretion."* 461 So. 2d 67, 69 (1984). Trial judges certainly have broad discretion

*The state court noted that, once the jury had been selected, petitioner was "satisfied" with it. 461 So. 2d 67, 69 (1984). This statement was made in the context of rejecting petitioner's appeal from the denial of his venue motion; after rejecting this venue challenge, the state court went on to address the merits of the asserted right to individual *voir dire*.

over the structuring of *voir dire*, but as federal and state courts have recognized, the extent and nature of pretrial publicity may necessitate individual *voir dire* to assure fair process in the selection of an impartial jury. In light of petitioner's substantial showing in the trial court of the need for individual *voir dire*, I would grant certiorari to address whether, and upon what showing, the Constitution requires trial judges to grant individual *voir dire*.

No. 84-6681. HENDERSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 463 So. 2d 196.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner, after contacting police and admitting involvement in a series of murders, unambiguously asserted his right to counsel and his desire to have no discussions with the police concerning his case outside the presence of counsel. The legal import of this assertion, made while in police custody, is clear; our cases establish a "'bright-line rule' that *all* questioning must cease after an accused requests counsel." *Smith* v. *Illinois*, 469 U. S. 91, 98 (1984); see also *Edwards* v. *Arizona*, 451 U. S. 477 (1981); *Miranda* v. *Arizona*, 384 U. S. 436, 474 (1966). The reason for this rule is also clear from our cases, for "[i]n the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, *supra*, at 98. This "bright-line rule" is thus an essential "protective devic[e] . . . employed to dispel the compulsion inherent in custodial surroundings" and to thereby assure that any statements by an accused are the product of free will rather than subtle coercion. *Miranda* v. *Arizona*, *supra*, at 458.

I

In this case, petitioner contends that police violated this "bright-line rule" and through custodial interrogation did persuade him to incriminate himself further notwithstanding his earlier request for counsel's assistance during questioning; yet the Florida Supreme Court sustained the admission of the subsequently obtained evidence simply on the fact that petitioner was eventually

persuaded and signed a waiver form. 463 So. 2d 196 (1985). Such a rationale cannot be made to conform to this Court's precedents, which establish that *as a precondition to a finding of waiver* a court must find that the accused, rather than the police, reopened dialogue about the subject matter of the investigation. See *Edwards* v. *Arizona*, *supra*, at 485; *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality opinion); *id.*, at 1054 (MARSHALL, J., dissenting).

This Court has not always found it easy to define exactly when and by whom dialogue was reopened, *ibid.*, and perhaps the instant case can be explained as resulting from these difficulties. Here, however, the State argues that petitioner "initiated" further dialogue by minimally responding to an unrequested police explanation of the accused's fate and by "conveying" a willingness to talk through nonverbal expressions and unrelated "subtle comments." The valuable right to be free from police interrogations in the absence of counsel cannot be made to be so fragile as to crumble under the weight of elicited and subjective inconsequentials. I would grant the petition to make clear that waiver of this right is not so lightly to be assumed.

II

A few days after his assertion of the right to counsel and his consultation with an attorney, petitioner was transported from one jail to another in connection with an unrelated criminal investigation. The drive lasted almost five hours, and the police officers accompanying petitioner were informed that he had asserted his right to counsel and had been advised by his counsel not to talk with the police. The police officers had nevertheless equipped themselves for the trip by taking along specially prepared forms by which petitioner could waive his right to be free from police interrogation in spite of his previous assertion of that right. In particular, the form declared that the signatory desired to make a statement to the police, that he did not want a lawyer, and that he was aware of his "constitutional rights to disregard the instruction of [his] attorney and to speak with the officers" transporting him. Response to Pet. for Cert. A–24.

During the course of the 5-hour drive, the police engaged in extended "casual conversation" with petitioner. Although the police officers asserted that none of this conversation concerned any as-

pect of the case, they also asserted that petitioner's general manner as well as various "subtle comments" conveyed to them that "his conscience was bothering him," *id.*, at A–21, and that "he wanted to discuss the [criminal] matter." *Id.*, at A–20. Near the end of the 5-hour drive, the police stopped the car and one of the officers got out to make a phone call. The officer who remained with the accused perceived that petitioner "acted like he was interested in what we were doing," *id.*, at A–60, so he explained that they were "calling the chief of detectives just to tell him that we were here." *Ibid.* When the accused "wanted to know what we would do then," the officer explained that they would probably place petitioner in jail. According to the officer, petitioner then responded with a "look on his face" that made clear his willingness to talk with the police. As the officer put it, "[i]t's hard to describe an expression," but he could see that petitioner was thinking: "You've got to be kidding. . . . Here I am. I know all these things, and all you're going to do is take me to jail." *Id.*, at A–61. The officer then directly asked petitioner if there was anything he would like to tell the police. When petitioner expressed a tentative willingness to give information about the location of his victims' bodies, the police confronted him with the previously prepared waiver forms, which he signed.

III

It is clear that the direct question by the police officer easily meets this Court's definition of interrogation. See *Rhode Island* v. *Innis*, 446 U. S. 291, 300–301 (1980). And the fact of the arrest, even without the 5-hour drive, makes the context clearly custodial. Thus the issue is whether petitioner "initiated" a dialogue with the police concerning the subject matter of the investigation. By the police officer's own testimony, the only actual speech by petitioner that directly related to his case was the casual question of what would happen after the officer telephoned the "chief of detectives." Although four Members of this Court found a similar statement to be "initiation" of dialogue in *Bradshaw*, *supra*, there the comment was at least unrelated to any prior police-initiated conversation. Here, in contrast, the comment was a response to the police officer's unsolicited partial explanation of the police's intentions. If petitioner's question is deemed a general inquiry regarding the investigation, then the police officer's comment that elicited it must

have been a similar reinitiation of dialogue. It is thus not surprising that the police insist that petitioner made clear his desire to talk through repeated, though "subtle," hints. But surely, the right to counsel cannot turn on a police officer's subjective evaluations of what must stand behind an accused's facial expressions, nervous behavior, and unrelated subtle comments made in casual conversation. If it were otherwise, the right would clearly be meaningless.

I dissent from the Court's denial of certiorari.

No. 84–6689. RUMBAUGH ET AL., INDIVIDUALLY AND AS NEXT FRIENDS OF RUMBAUGH *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 2d 395.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioners, Harvey and Rebecca Rumbaugh, are the parents of Charles Rumbaugh, who has been sentenced to death. They seek to present a next friend petition for writ of habeas corpus on behalf of their son, while their son refuses to seek collateral review of his conviction or death sentence and resists his parents' efforts to secure such review. The son's reason for wanting no review is that he desires to die as quickly as possible so as to end feelings of intolerable depression that plague him. A Federal District Court found that Charles Rumbaugh was mentally competent to waive his rights and thus to assure his own death, and it accordingly dismissed the petition for writ of habeas corpus. *Rumbaugh* v. *Estelle*, 558 F. Supp. 651 (ND Tex. 1983). The Court of Appeals affirmed. *Rumbaugh* v. *Procunier*, 753 F. 2d 395 (CA5 1985). The issue presented is whether those determinations comported with the standard for waiver set forth in *Rees* v. *Payton*, 384 U. S. 312 (1966). Because the decisions below substantially strayed from the *Rees* standard, so that they, in essence, allow a state capital punishment scheme to become an instrument for the effectuation of a suicide by a mentally ill man, I dissent from the denial of certiorari.

Rees specified the findings necessary to a determination that one who seeks to waive further review of a criminal conviction is competent to make such a grave choice. Under *Rees* the courts

below were required to determine "whether [Charles Rumbaugh] has [the] capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.*, at 314. Rumbaugh was examined by numerous psychiatrists, and based on their testimony and reports, a Federal District Court found Rumbaugh competent.

This conclusion, however, was not based on a finding that Rumbaugh's choice was uninfluenced by mental illness. To the contrary, the court found that Rumbaugh suffered from severe mental illness and that this illness was a major influence on his choice. The courts below relied on a determination that Rumbaugh "logically" chose death *because* he had become a victim of mental illness, suffering from "frequent bouts of paranoia," "auditory hallucinations," and severe "depression." Rumbaugh seeks death because he knows himself to be mentally ill and has lost hope of obtaining treatment. If not for his illness and his pessimism regarding access to treatment, he would probably continue to challenge his death sentence; but faced with his vision of life without treatment for severe mental illness, Rumbaugh chooses to die.

The choice the courts below describe is a choice of a desperate man seeking to use the State's machinery of death as a tool of suicide. It is no more nor less rational than the tragic choices of those driven to suicide by their tormented inner lives in a myriad of contexts. Although the District Court and the divided panel of the Fifth Circuit determined that Rumbaugh was rational in his calculation that continued life would for him bring misery, this was not the sort of free and uncoerced "rational" choice that we required in *Rees*. As Circuit Judge Goldberg said in dissent below:

> "[R]ational choice requires that the ends of [a person's] actions are *his* ends. That is, rational choice embraces 'autonomous' choice. If a person takes logical steps toward a goal that is substantially the product of a mental illness, the decision in a fundamental sense is not his: He is incompetent." *Rumbaugh* v. *Procunier*, 753 F. 2d, at 404.

This Court should not allow the erosion of the standard set in *Rees*, and it should certainly prevent such erosion in the context of capital punishment. In the context of capital punishment, such

an erosion allows a State's machinery of death to go forth, regardless of the presence of possible constitutional infirmities in a death sentence, because it has become a tool offered to the hopeless as a means of ending their own lives.

I dissent from the denial of certiorari.

Rehearing Denied

No. 84-1319. DENSMORE *v.* CITY OF BOCA RATON, FLORIDA, ET AL., 471 U. S. 1124;

No. 84-1570. JOHNSON *v.* MERIT SYSTEMS PROTECTION BOARD, 471 U. S. 1102;

No. 84-1632. SUTER *v.* UNITED STATES, 471 U. S. 1103;

No. 84-1637. HOLDERMAN *v.* UNITED STATES, 471 U. S. 1095;

No. 84-1638. HOLDERMAN *v.* UNITED STATES, 471 U. S. 1095;

No. 84-5484. JARRELL *v.* BALKCOM, WARDEN, 471 U. S. 1103;

No. 84-6033. BROGDON *v.* LOUISIANA, 471 U. S. 1111;

No. 84-6074. GREGORY *v.* MARYLAND, 471 U. S. 1103;

No. 84-6222. BOCOOK *v.* TATE, 471 U. S. 1118;

No. 84-6280. ZARRILLI *v.* BRAUNSTEIN, 471 U. S. 1020;

No. 84-6372. HAAS *v.* NICHOLS ET AL., 471 U. S. 1105;

No. 84-6399. CERVI *v.* KEMP, WARDEN, 471 U. S. 1131;

No. 84-6437. SAVAGE *v.* CITY OF COLUMBUS, 471 U. S. 1118;

No. 84-6497. WESER *v.* MASCHNER ET AL., 471 U. S. 1118; and

No. 84-6534. STEWART *v.* ILLINOIS, 471 U. S. 1131. Petitions for rehearing denied.

No. 84-465. BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES, ET AL. *v.* ROMANO, 471 U. S. 606; and

No. 84-5765. ROBERTSON *v.* ROBERTSON, 469 U. S. 1164. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

JULY 2, 1985

Appointment of Director of Administrative Office of U. S. Courts

It is ordered that L. Ralph Mecham be appointed Director of the Administrative Office of the United States Courts to succeed William E. Foley, effective July 15, 1985, pursuant to the provisions of § 601 of Title 28 of the United States Code.

Appeals Dismissed

No. 84-1292. STEARNS COAL & LUMBER CO., INC. *v.* KENTUCKY NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION

CABINET. Appeal from Sup. Ct. Ky. dismissed for want of substantial federal question. Reported below: 678 S. W. 2d 378.

No. 84–1343. FERGUSON ET AL. *v.* WAMBLE ET AL.; and
No. 84–1355. BENNETT, SECRETARY OF EDUCATION, ET AL. *v.* WAMBLE ET AL. Appeals from D. C. W. D. Mo. Motion of Baptist Joint Committee on Public Affairs for leave to file a brief as *amicus curiae* granted. Appeals dismissed for want of jurisdiction. Reported below: 598 F. Supp. 1356.

No. 84–1528. WAMBLE ET AL. *v.* BENNETT, SECRETARY OF EDUCATION, ET AL. Appeal from D. C. W. D. Mo. dismissed for want of jurisdiction. Reported below: 598 F. Supp. 1356.

Certiorari Granted—Vacated and Remanded

No. 84–604. JOEL ET AL. *v.* CIRRITO ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sedima, S. P. R. L.* v. *Imrex Co., ante,* p. 479, and *American National Bank* v. *Haroco, Inc., ante,* p. 606. Reported below: 741 F. 2d 524.

No. 84–657. BANKERS TRUST CO. *v.* RHOADES ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sedima, S. P. R. L.* v. *Imrex Co., ante,* p. 479, and *American National Bank* v. *Haroco, Inc., ante,* p. 606. Reported below: 741 F. 2d 511.

No. 84–1033. UNITED STATES *v.* PFLAUMER. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Bagley, ante,* p. 667. Reported below: 740 F. 2d 1298.

No. 84–1084. TIFFANY INDUSTRIES, INC. *v.* ALEXANDER GRANT & CO.; and
No. 84–1222. KAHN *v.* ALEXANDER GRANT & CO. C. A. 8th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Sedima, S. P. R. L.* v. *Imrex Co., ante,* p. 479, and *American National Bank* v. *Haroco, Inc., ante,* p. 606. JUSTICE BLACKMUN would deny the petitions for writs of certiorari. Reported below: 742 F. 2d 408.

No. 84–1500. CONTICOMMODITY SERVICES, INC. *v.* SCHOR ET AL.; and
No. 84–1519. COMMODITY FUTURES TRADING COMMISSION *v.* SCHOR ET AL. C. A. D. C. Cir. Certiorari granted, judgment

vacated, and cases remanded for further consideration in light of *Thomas* v. *Union Carbide Agricultural Products Co.*, *ante*, p. 568. Reported below: 239 U. S. App. D. C. 159, 740 F. 2d 1262.

Certiorari Granted

No. 84–1279. DELAWARE *v.* VAN ARSDALL. Sup. Ct. Del. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 486 A. 2d 1.

Certiorari Denied

No. 84–722. LONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84–5554. HENAO-CASTANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1364.

JULY 18, 1985

Miscellaneous Order

No. A–5. OFFICE OF PERSONNEL MANAGEMENT ET AL. *v.* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO, ET AL. C. A. D. C. Cir. Motion of National Treasury Employees Union for leave to intervene granted. Motions of National Treasury Employees Union and American Federation of Government Employees, AFL–CIO, to stay the order entered by THE CHIEF JUSTICE on July 3, 1985, denied. JUSTICE BRENNAN and JUSTICE POWELL took no part in the consideration or decision of these motions.

JULY 27, 1985

Dismissal Under Rule 53

No. 84–1939. CATHOLIC BISHOP OF CHICAGO *v.* F. E. L. PUBLICATIONS, LTD. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 754 F. 2d 216.

AUGUST 13, 1985

Dismissal Under Rule 53

No. 85–85. MCCLENDON *v.* GUIN, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, ET AL. C. A. 11th Cir. Petition for writ of certiorari and/or other relief dismissed under this Court's Rule 53.

AUGUST 14, 1985

Miscellaneous Orders

No. D–476. IN RE DISBARMENT OF WHITTINGTON. Disbarment entered. [For earlier order herein, see 469 U. S. 1203.]

No. D–482. IN RE DISBARMENT OF BRUNWIN. Disbarment entered. [For earlier order herein, see 470 U. S. 1047.]

No. D–491. IN RE DISBARMENT OF PECORARO. Disbarment entered. [For earlier order herein, see 471 U. S. 1097.]

No. D–492. IN RE DISBARMENT OF SURGENT. Disbarment entered. [For earlier order herein, see 471 U. S. 1097.]

No. D–495. IN RE DISBARMENT OF DICKER. Disbarment entered. [For earlier order herein, see 471 U. S. 1133.]

Rehearing Denied

No. 84–1436. DUGAN & MEYERS CONSTRUCTION CO., INC., ET AL. *v.* WORTHINGTON PUMP CORP. (USA), 471 U. S. 1135;

No. 84–1482. KARAPINKA *v.* UNION CARBIDE CORP., 472 U. S. 1008;

No. 84–1553. ARANGO *v.* FLORIDA BAR, 472 U. S. 1003;

No. 84–1573. DESAI *v.* TOMPKINS COUNTY TRUST CO., 471 U. S. 1125;

No. 84–1674. ENDER *v.* CHRYSLER CORP. ET AL., 472 U. S. 1009;

No. 84–1685. YEE *v.* VITOUSEK ET AL., 472 U. S. 1009;

No. 84–1763. WALBER, DBA WALBER CONSTRUCTION CO. *v.* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, 471 U. S. 1132;

No. 84–1764. WALBER, DBA WALBER CONSTRUCTION CO. *v.* UNITED STATES, 471 U. S. 1132;

No. 84–1817. THIBAULT *v.* WEISS ET AL., 472 U. S. 1013;

No. 84–1818. WILLIAMS ET UX. *v.* GOVINE ET AL., 472 U. S. 1013;

No. 84–6414. MARLOW *v.* TULLY, COMMISSIONER, DEPARTMENT OF TAXATION AND FINANCE OF NEW YORK STATE, 472 U. S. 1010;

No. 84–6579. MARCH *v.* MARCH, 472 U. S. 1004; and

No. 84–6612. MAURER *v.* OHIO, 472 U. S. 1012. Petitions for rehearing denied.

No. 84-6617. LUCAS *v.* SOUTH CAROLINA, 472 U. S. 1012;

No. 84-6627. THOMAS *v.* ANGELONE, WARDEN, ET AL., 472 U. S. 1020;

No. 84-6641. SPAN *v.* MCCALL, 472 U. S. 1020;

No. 84-6672. WESER *v.* MASCHNER, DIRECTOR, KANSAS STATE PENITENTIARY, ET AL., 472 U. S. 1030;

No. 84-6675. MEADOWS *v.* HOLLAND, WARDEN, 472 U. S. 1020;

No. 84-6727. CELESTINE *v.* BLACKBURN, WARDEN, 472 U. S. 1022; and

No. 84-6763. DUNTON *v.* DEPARTMENT OF THE NAVY, 472 U. S. 1021. Petitions for rehearing denied.

No. 83-1919. CITY OF OKLAHOMA CITY *v.* TUTTLE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF TUTTLE, 471 U. S. 808. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 84-6420. CONNOR *v.* HAUGH ET AL., 471 U. S. 1105. Motion of petitioner for leave to file petition for rehearing denied.

AUGUST 15, 1985

Dismissal Under Rule 53

No. 84-1608. BAILEY, TRUSTEE *v.* BUTCHER. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 753 F. 2d 465.

Miscellaneous Order

No. A-127 (85-5220). PINKERTON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death scheduled for Thursday, August 15, 1985, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. THE CHIEF JUSTICE and JUSTICE WHITE would deny the application. JUSTICE REHNQUIST took no part in the consideration or decision of this application.

JUSTICE POWELL, concurring.

Ordinarily, I would vote to deny the petition for writ of certiorari and the application for stay as I find no substance to any of petitioner's claims. But it is not clear from the votes of the other Justices absent from Washington, whether there will be four votes to grant the petition for writ of certiorari, and at this late hour it has not been possible to clarify their positions. In view of this doubt, I will vote to grant the stay.

AUGUST 28, 1985

Miscellaneous Orders

No. A–28. SAN FRANCISCO POLICE OFFICERS' ASSN. ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. D. C. N. D. Cal. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–32. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* REDBUD HOSPITAL DISTRICT, DBA REDBUD COMMUNITY HOSPITAL, ET AL. D. C. N. D. Cal. Motion to vacate the stay entered by JUSTICE REHNQUIST on July 24, 1985 [*post*, p. 1308], denied.

Rehearing Denied

No. 82–2157. CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND ET AL. *v.* CENTRAL TRANSPORT, INC., ET AL., 472 U. S. 559;

No. 84–351. ATASCADERO STATE HOSPITAL ET AL. *v.* SCANLON, *ante*, p. 234;

No. 84–761. DATA GENERAL CORP. *v.* DIGIDYNE CORP. ET AL., *ante*, p. 908;

No. 84–1292. STEARNS COAL & LUMBER CO., INC. *v.* KENTUCKY NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET, *ante*, p. 921;

No. 84–1444. PRICE *v.* UNITED STATES, *ante*, p. 904;

No. 84–1716. WILSON ET AL. *v.* NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY OF DURHAM ET AL., 472 U. S. 1018;

No. 84–1843. HILJER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HILJER *v.* WALTERS, ADMINISTRATOR OF VETERANS AFFAIRS, 472 U. S. 1029; and

No. 84–5717. MOORE *v.* MAGGIO, WARDEN, ET AL., 472 U. S. 1032. Petitions for rehearing denied.

No. 84–6621. JENKINS *v.* OHIO, 472 U. S. 1032;
No. 84–6636. ROSS *v.* GEORGIA, 472 U. S. 1022;
No. 84–6694. WILLIAMS ET AL. *v.* GRAND LODGE OF FREEMASONRY ET AL., 472 U. S. 1023;
No. 84–6696. SEITU *v.* COUNTISS ET AL., 472 U. S. 1031; and
No. 84–6728. INGRAM *v.* GEORGIA, *ante*, p. 911. Petitions for rehearing denied.

No. 83–1842. GARRETT *v.* UNITED STATES, 471 U. S. 773. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 84–1811 (A–39). AFFLERBACH ET AL. *v.* UNITED STATES, 472 U. S. 1029. Application for suspension of the effect of the order denying certiorari, addressed to JUSTICE BRENNAN and referred to the Court, denied. Petition for rehearing denied.

AUGUST 29, 1985

Dismissal Under Rule 53

No. 83–1234. ASHLAND OIL, INC., ET AL. *v.* GOOD ET AL. Sup. Ct. Kan. Certiorari dismissed under this Court's Rule 53. Reported below: 233 Kan. 846, 667 P. 2d 337.

SEPTEMBER 3, 1985

Miscellaneous Order

No. A–181. DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death scheduled for Wednesday, September 4, 1985, presented to JUSTICE POWELL, and by him referred to the Court, denied.

CHIEF JUSTICE BURGER, concurring.

Because this Court has had three prior opportunities to review the issues raised in this application and two opportunities to review applicant's petition for a federal writ of habeas corpus, see *Darden* v. *Florida*, 430 U. S. 704 (1977) (dismissing certiorari as improvidently granted); *Darden* v. *Wainwright*, 467 U. S. 1230 (1984) (denying certiorari); *Wainwright* v. *Darden*, 469 U. S. 1202 (1985) (vacating and remanding 725 F. 2d 1526 (CA11 1984)), and because the issues raised in this application have been thoroughly

considered and resolved by federal and state courts, I concur in the denial of the application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and a petition for writ of certiorari and would vacate the death sentence in this case.

JUSTICE BLACKMUN and JUSTICE STEVENS, dissenting.

Because this Court has not yet had an opportunity to review the denial of applicant's first petition for a federal writ of habeas corpus, we would grant the application for a stay of execution to enable this Court to consider whether to grant certiorari in the normal course of business.

Certiorari Granted

No. 85–5319 (A–181). DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Upon request of counsel for petitioner, the application for stay of execution has been considered as a petition for writ of certiorari. The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The order of this date denying the application for stay is vacated. The application for stay of execution of the sentence of death is granted pending the sending down of the judgment of this Court. JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would deny the application. Reported below: 767 F. 2d 752.

JUSTICE POWELL, concurring in the granting of the application for a stay.

My vote is to grant the application for a stay, although I find no merit whatever in any of the claims advanced in the petition for certiorari. All of these claims have been carefully considered and repeatedly rejected by the courts below, including as recently as this afternoon the Federal District Court for the Middle District of Florida, and this evening the Court of Appeals for the Eleventh Circuit. Indeed the petition for certiorari was merely the stay application that had been denied, and restyled on the request of counsel as a petition for certiorari. But in view of the unusual situation in which four Justices have voted to grant certiorari

(doing so without waiting for the Court of Appeals to act on Darden's second federal habeas petition that was before that court this evening), and in view of the fact that this is a capital case with petitioner's life at stake, and further in view of the fact that the Justices are scattered geographically and unable to meet for a Conference, I feel obligated to join in granting the application for a stay.

CHIEF JUSTICE BURGER, dissenting.

In the 12 years since petitioner was convicted of murder and sentenced to death, the issues now raised in the petition for certiorari have been considered by this Court four times, see *Darden* v. *Florida*, 430 U. S. 704 (1977) (dismissing certiorari as improvidently granted); *Darden* v. *Wainwright*, 467 U. S. 1230 (1984) (denying certiorari); *Wainwright* v. *Darden*, 469 U. S. 1202 (1985) (vacating and remanding 725 F. 2d 1526 (CA11 1984)); *Darden* v. *Wainwright*, *ante*, p. 927 (order dated September 3, 1985, denying application for stay), and have been passed upon no fewer than 95 times by federal and state court judges. Upon review of the petition and the history of this case, I conclude that no issues are presented that merit plenary review by this Court. Because we abuse our discretion when we accept meritless petitions presenting claims that we rejected only hours ago, I dissent.

SEPTEMBER 6, 1985

Miscellaneous Order

No. A–182 (84–6953). BURGER *v.* KEMP, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death scheduled for Monday, September 9, 1985, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

SEPTEMBER 13, 1985

Dismissal Under Rule 53

No. 84–1875. REICHHOLD CHEMICALS, INC. *v.* AIR PRODUCTS & CHEMICALS, INC. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 755 F. 2d 1559.

SEPTEMBER 17, 1985

Dismissal Under Rule 53

No. 84-1668. CITY OF NEW ORLEANS, LOUISIANA *v.* MIDDLE SOUTH ENERGY, INC., ET AL. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 241 U. S. App. D. C. 326, 747 F. 2d 763.

SEPTEMBER 18, 1985

Dismissal Under Rule 53

No. 84-1838. 168-176 EAST 88TH STREET CORP. ET AL. *v.* EVANGELISTA ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 755 F. 2d 913.

Miscellaneous Orders

No. A-941. IN RE PETRILLO. Super. Ct. N. J., Law Div. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D-489. IN RE DISBARMENT OF MCGARRY. Disbarment entered. [For earlier order herein, see 471 U. S. 1096.]

No. D-494. IN RE DISBARMENT OF EDWARDS. Disbarment entered. [For earlier order herein, see 471 U. S. 1133.]

No. D-508. IN RE DISBARMENT OF SHORT. Disbarment entered. [For earlier order herein, see 472 U. S. 1024.]

No. D-510. IN RE DISBARMENT OF CODY. It is ordered that John Cody, of Sierra Vista, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-511. IN RE DISBARMENT OF STOCK. It is ordered that Eugene A. Stock, of Marysville, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-512. IN RE DISBARMENT OF MEISNER. It is ordered that Anthony B. Meisner, of Berkley, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–513. IN RE DISBARMENT OF NASH. It is ordered that Donald Dean Nash, of Portland, Ore., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–514. IN RE DISBARMENT OF LEBOVITZ. It is ordered that Robert Alan Lebovitz, of Pittsburgh, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–515. IN RE DISBARMENT OF KANTER. It is ordered that Jeffrey Marc Kanter, of Roslyn Heights, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–516. IN RE DISBARMENT OF MCKABA. It is ordered that Raymond McKaba, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–517. IN RE DISBARMENT OF SABISTON. It is ordered that William Devine Sabiston, Jr., of Carthage, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83–1968. THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. *v.* GINGLES ET AL. D. C. E. D. N. C. [Probable jurisdiction noted, 471 U. S. 1064.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–2004. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* ZENITH RADIO CORP. ET AL. C. A. 3d Cir. [Certiorari granted, 471 U. S. 1002.] Motion of American Association of Exporters & Importers et al. for leave to file a brief as *amici curiae* granted. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–495. THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLO-

GISTS ET AL. C. A. 3d Cir. [Probable jurisdiction postponed, 471 U. S. 1014.] Motion of Alan Ernest to allow counsel to represent children unborn and born alive denied. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 84–836. VASQUEZ, WARDEN *v.* HILLERY. C. A. 9th Cir. [Certiorari granted, 470 U. S. 1026.] Motion of NAACP Legal Defense & Educational Fund, Inc., for leave to file a brief as *amicus curiae* granted.

No. 84–1160. PEMBAUR *v.* CITY OF CINCINNATI ET AL. C. A. 6th Cir. [Certiorari granted, 472 U. S. 1016.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 84–1244. DAVIS ET AL. *v.* BANDEMER ET AL. D. C. S. D. Ind. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of Indiana State Conference of NAACP Branches for leave to file out-of-time motion for divided argument denied.

No. 84–1288. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* JEFF D. ET AL., MINORS, BY AND THROUGH THEIR NEXT FRIEND, JOHNSON, ET AL. C. A. 9th Cir. [Certiorari granted, 471 U. S. 1098.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–1340. WYGANT ET AL. *v.* JACKSON BOARD OF EDUCATION ET AL. C. A. 6th Cir. [Certiorari granted, 471 U. S. 1014.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 84–1360. CITY OF RENTON ET AL. *v.* PLAYTIME THEATRES, INC., ET AL. C. A. 9th Cir. [Probable jurisdiction noted, 471 U. S. 1013.] Motions of National Institute of Municipal Law Officers, National League of Cities et al., and Freedom Council Foundation for leave to file briefs as *amici curiae* granted.

No. 84–1379. DIAMOND ET AL. *v.* CHARLES ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 471 U. S. 1115.] Motion of

Alan Ernest to allow counsel to represent children unborn and born alive denied. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied.

No. 84–1484. WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS ET AL. *v.* GOULD INC. C. A. 7th Cir. [Probable jurisdiction noted, 471 U. S. 1115.] Motion of National Governors' Association et al. for leave to file a brief as *amici curiae* granted.

No. 84–1485. MORAN, SUPERINTENDENT, RHODE ISLAND DEPARTMENT OF CORRECTIONS *v.* BURBINE. C. A. 1st Cir. [Certiorari granted, 471 U. S. 1098.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–1493. NATIONAL LABOR RELATIONS BOARD *v.* FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL.; and

No. 84–1509. SEATTLE-FIRST NATIONAL BANK *v.* FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. C. A. 9th Cir. [Certiorari granted, 471 U. S. 1098.] Motion of petitioners for divided argument granted.

No. 84–1503. CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL–CIO, ET AL. *v.* HUDSON ET AL. C. A. 7th Cir. [Certiorari granted, 472 U. S. 1007.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 84–1601. AETNA LIFE INSURANCE CO. *v.* LAVOIE ET AL. Sup. Ct. Ala. [Probable jurisdiction postponed, 471 U. S. 1134.] Motion of Association of Southern California Defense Counsel et al. for leave to file a brief as *amici curiae* granted.

No. 84–1686. SORENSON *v.* SECRETARY OF THE TREASURY ET AL. C. A. 9th Cir. [Certiorari granted, 472 U. S. 1016.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 84–1725. UNITED STATES *v.* CITY OF FULTON ET AL. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 903.] Motion of

the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 84-1728. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. D. C. Cir. [Certiorari granted, 472 U. S. 1026.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 84-1803. ATTORNEY GENERAL OF NEW YORK *v.* SOTO-LOPEZ ET AL. C. A. 2d Cir. [Probable jurisdiction noted, *ante*, p. 903.] Motion of appellant to dispense with printing the joint appendix denied.

Rehearing Denied

No. 84-6005. WILLIAMS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 472 U. S. 1018. Petition for rehearing denied.

No. 84-1720. HOLDING *v.* SOVRAN BANK, EXECUTOR AND TRUSTEE OF THE ESTATE OF MUSE, *ante*, p. 911. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

SEPTEMBER 19, 1985

Dismissal Under Rule 53

No. 84-1929. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* ZEMBOWER ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 755 F. 2d 174.

SEPTEMBER 20, 1985

Dismissal Under Rule 53

No. 85-209. UNITED STATES *v.* MOLSBERGEN. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 757 F. 2d 1016.

SEPTEMBER 23, 1985

Dismissal Under Rule 53

No. 85-146. BANCO CREDITO AGRICOLA DE CARTAGO ET AL. *v.* ALLIED BANK INTERNATIONAL, AS AGENT FOR FIDELITY

UNION TRUST CO. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 757 F. 2d 516.

Miscellaneous Order

No. A–220. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* BOOKER. Application to vacate the order of the United States Court of Appeals for the Eleventh Circuit, dated September 9, 1985, staying the execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, granted. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the application to vacate the stay.

JUSTICE POWELL, concurring.*

My vote was to grant Florida's application to vacate the stay of execution in this case. I write as it seems important to address two points raised by JUSTICE MARSHALL's dissent.

I

The dissent contends that our action in this case conflicts with our customary deference to the decisions of courts of appeals on stay applications. Such deference is not absolute. We have noted previously that "[s]tays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari from this Court to the court of appeals that has denied a writ of habeas corpus." *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983). To the contrary, stays in cases of this sort should be granted only when (i) it is reasonably probable that four Members of the Court would vote to grant certiorari or to note probable jurisdiction, and also (ii) there is a significant possibility that this Court will reverse the decision below. *Ibid.*[1] In this case, after examining the State's application to vacate, the respondent's response, the application for a stay filed with the Court of Appeals, and the opinions of the Court of Appeals and the District Court, I concluded that there was no basis for finding that either prong of the *Barefoot* v. *Estelle* test was satisfied. The Court of Appeals offered no reasons for its decision to grant the stay application, and no plausible reason appeared from the record.

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*This opinion was filed September 24, 1985.

[1] The third requirement—that irreparable harm will result if a stay is not granted—is necessarily present in capital cases.

Deference is a two-way street. Although my vote did not depend on speculation as to the Court of Appeals' reason for granting respondent's stay application, it would not be surprising if that court was confused by the seeming absence of deference in our decisions in *Pinkerton* v. *McCotter*, *ante*, p. 925, and *Darden* v. *Wainwright*, *ante*, p. 928. In both of those cases, this Court reversed denials of stays of execution, on the ground that four Justices either had voted to grant certiorari or had suggested that such a vote was likely. I joined those decisions out of a concern that the Court ordinarily should not permit an execution to moot our consideration of a case that we had agreed, or probably would agree, to hear on the merits. I noted, however, that in my view the petitions in those cases were wholly without merit. *Darden*, *ante*, at 928 (POWELL, J., concurring); *Pinkerton*, *ante*, at 926 (POWELL, J., concurring). Consequently, and given the Court of Appeals' greater familiarity with the case, there was a strong argument that the proper course was to accept that court's evaluation of the likelihood of reversal. I declined to accept that argument in those cases, although the decision was a close one.[2]

If affirmance was not required in *Pinkerton* and *Darden* under an appropriately deferential standard of review, it cannot be *necessary* here. In *Pinkerton* and *Darden*, the Court of Appeals' judgment that reversal on the merits was unlikely had substantial force; in this case, the Court of Appeals' decision lacks a plausible justification. Only a generalized preference for delay in capital punishment cases would justify affirming the issuance of a stay solely on deference grounds, while according little or no deference where a stay has been denied below. In my view, the degree of deference accorded court of appeals rulings on stay applications cannot properly depend so completely on the result reached below.[3] Rather, this Court should both hesitate to overturn lower courts' decisions—since those decisions often reflect superior knowledge of and familiarity with the particular case—and yet remain constant in our duty to reverse those decisions in which it

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[2] *Darden* v. *Wainwright*, *ante*, at 928 (POWELL, J., concurring); *Pinkerton* v. *McCotter*, *ante*, at 926 (POWELL, J., concurring).

[3] If this Court defers only to grants of stays, while giving searching review to every denial of a stay, the lower federal courts may in time come to issue stays routinely. In that event, *Barefoot* v. *Estelle*'s statement that stays of execution are not automatic in capital cases, 463 U. S., at 895, would effectively be overruled.

appears that a court of appeals has abused its discretion. Application of these principles in *Pinkerton* and *Darden* was difficult, given my view that the petitions in those cases were meritless. This case plainly presents weaker grounds for affirming the decision reached below.[4]

II

The second point which the dissent raises requires less discussion. The dissent appears to conclude that it is inappropriate, in cases such as this one, to vacate a stay prior to the filing of the petition for certiorari. This position would render the grant of a stay effectively unreviewable in capital cases. The role of a stay in such cases is to delay the execution while the petition for certiorari is prepared and filed. If a stay, once entered, must necessarily remain in place until it has accomplished its purpose, then review of decisions to grant stays is senseless. This Court has never suggested that the discretion to grant or deny stays in capital cases (or any other class of cases) is total.

Finally, it bears emphasizing that the State has a legitimate interest in carrying out its lawfully imposed sentences. Respondent was sentenced to death for a particularly brutal murder in 1978. His conviction and sentence have thrice been reviewed by the Florida Supreme Court. *Booker* v. *State*, 441 So. 2d 148 (1983); *Booker* v. *State*, 413 So. 2d 756 (1982); *Booker* v. *State*, 397 So. 2d 910, cert. denied, 454 U. S. 957 (1981). He has filed two petitions for habeas corpus in federal court; both have been denied. *Booker* v. *Wainwright*, 764 F. 2d 1371 (CA11 1985); *Booker* v. *Wainwright*, 703 F. 2d 1251 (CA11), rehearing denied, 708 F. 2d 734, cert. denied, 464 U. S. 922 (1983). This Court has twice denied certiorari. *Booker* v. *Wainwright*, 464 U. S. 922 (1983); *Booker* v. *Florida*, 454 U. S. 957 (1981). None of the many opinions that have been filed in this protracted litigation suggests that respondent is innocent or that his conviction raises any serious constitutional issues. For our system of justice to function effectively, litigation in cases such as this one must cease when there is no reasonable ground for questioning either the guilt of the defendant or the constitutional sufficiency of the procedures employed to convict and sentence him.

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[4] I should emphasize that nothing in either *Pinkerton*, *Darden*, or this case alters the test that we set forth in *Barefoot* v. *Estelle* for determining when entry of a stay is appropriate.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Today the Court vacates a stay pending certiorari granted by the Court of Appeals for the Eleventh Circuit, although we have not even received the petition for certiorari. In so doing, the Court ignores repeated reminders by Justices of the Court that our power to vacate a stay entered by a lower court should be reserved only for exceptional circumstances, see, *e. g.*, *Kemp* v. *Smith*, 463 U. S. 1321 (1983) (POWELL, J., in chambers); *O'Connor* v. *Board of Education*, 449 U. S. 1301 (1980) (STEVENS, J., in chambers), and that the lower court's decision is "deserving of great weight," *Commodity Futures Trading Comm'n* v. *British American Commodity Options Corp.*, 434 U. S. 1316, 1319 (1977) (MARSHALL, J., in chambers).

Although the State's brief application fails even to suggest that it has met this heavy burden, the Court has moved "with an impetuousness and arrogance that is truly astonishing," *Wainwright* v. *Adams*, 466 U. S. 964, 966 (1984) (MARSHALL, J., dissenting from the grant of application to vacate stay of execution). The apparent basis for the State's application is a concern that the Court of Appeals understood our recent decisions in *Pinkerton* v. *McCotter*, *ante*, p. 925, and *Darden* v. *Wainwright*, *ante*, p. 928, to mandate the grant of a stay in this case. However, this Court has provided detailed guidance to the courts of appeals as to stays in capital cases, see *Barefoot* v. *Estelle*, 463 U. S. 880, 887–896 (1983). There is no reason for us to assume, on the meager record before us, that the Court of Appeals was unaware of, or misapplied, those standards—let alone that it committed the gross abuse of discretion necessary to support a grant of this application, see *Wainwright* v. *Adams*, *supra*, at 965. I am therefore at a loss to understand the Court's unwillingness to let matters run their ordinary course.

I dissent.

SEPTEMBER 25, 1985

Miscellaneous Order

No. A–236 (85–5466). CELESTINE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death scheduled for Saturday, September 28, 1985, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of

certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

OCTOBER 2, 1985

Miscellaneous Order

No. A–235. THREE MILE ISLAND ALERT, INC. *v.* UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. Application to continue the stay entered on June 7, 1985, by the United States Court of Appeals for the Third Circuit, presented to JUSTICE BRENNAN, and by him referred to the Court, denied. JUSTICE BRENNAN would continue the stay pending the timely filing and disposition of a petition for writ of certiorari.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 939 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

OFFICE OF PERSONNEL MANAGEMENT ET AL. *v.* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO

ON APPLICATION TO VACATE ORDER

No. A–5. Decided July 5, 1985

An application to vacate the Court of Appeals' June 29, 1985, order—which, *inter alia*, directed that the July 1, 1985, effective date of certain new regulations of applicant Office of Personnel Management be stayed until further order of that court—is granted. A fews days before the effective date of the regulations, which allow federal agencies to give more weight to merit and less weight to seniority in personnel decisions, respondent sought a temporary restraining order blocking implementation of the regulations from the District Court, which denied the requested order but explicitly contemplated a prompt hearing on a preliminary injunction. On appeal, the Court of Appeals, in addition to staying the effective date of the regulations, ordered that respondent's emergency motion for injunctive relief from that court be held in abeyance and that the District Court decide by July 10, 1985, "any motion for a preliminary injunction." The established rule is that denials of temporary restraining orders are ordinarily not appealable, and the Court of Appeals erred in reasoning that because a hearing on a preliminary injunction could not be held before the regulations went into effect, the District Court's denial of the temporary restraining order was tantamount to a denial of a preliminary injunction. The authorities relied upon by the Court of Appeals relate to *grants* rather than, as here, *denials* of temporary restraining orders. Thus the Court of Appeals had no jurisdiction to review the District Court's denial of the temporary restraining order, and should have dismissed the appeal, thereby allowing respondent to proceed in the District Court on a motion for a preliminary injunction.

CHIEF JUSTICE BURGER, Circuit Justice.

On October 25, 1983, the Office of Personnel Management (OPM) published in final form new personnel regulations

affecting federal employees.[1] The new regulations were intended to allow federal agencies to give more weight to merit and less weight to seniority in personnel decisions. The new regulations were to take effect November 25, 1983.

On November 12, 1983, Congress adopted House Joint Resolution 413 which, in effect, prohibited OPM and several other federal agencies from expending funds appropriated under that resolution "to implement, promulgate, administer or enforce" the new regulations.[2] On November 21, 1983, OPM announced that the new regulations would become effective on November 25, 1983.[3] The announcement stated that no expenditure was required for the new regulations to go into effect and that each federal agency would administer and enforce the regulations without the assistance or oversight of OPM. The implementation of the new regulations was stayed on November 23, 1983, however, by the United States District Court for the District of Columbia,[4] and that stay was affirmed by the Court of Appeals on April 27, 1984.[5] In the Continuing Appropriations Act for 1985, enacted in October 1984, Congress extended the restrictions on the implementation of the new regulations but specifically provided that the restrictions "shall expire on July 1, 1985."

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[1] 5 CFR pts. 300, 335, 351, 430, 431, 451, 531, 532, 540, 551, 771 (1984). For a discussion of the events leading up to the publication of the new regulations on October 25, 1983, see *National Treasury Employees Union* v. *Devine*, 236 U. S. App. D. C. 22, 23–24, 733 F. 2d 114, 115–116 (1984) *(NTEU)*.

[2] H. J. Res. 413, Pub. L. 98–151, 97 Stat. 964.

[3] OPM News Release.

[4] *National Treasury Employees Union* v. *Devine*, No. 83–3322 (DC Nov. 24, 1983) (temporary restraining order); *National Treasury Employees Union* v. *Devine*, 577 F. Supp. 738 (DC 1983).

[5] *NTEU*. In its opinion in *NTEU*, the Court of Appeals affirmed the judgment of the District Court and declared that the new regulations were "null and void" until the barriers erected by Congress to the implementation thereof are removed. 236 U. S. App. D. C., at 28, 733 F. 2d, at 120. Once those barriers are removed, "OPM will be free to . . . implement . . . and enforce the [new regulations]." *Ibid.*

Pub. L. 98–473, 98 Stat. 1963, incorporating by reference provisions of H. R. Rep. 98–993, p. 13 (1984).

On June 28, 1985—some eight months after Congress had finally fixed the date on which the new regulations would become effective and fewer than 72 hours before that effective date—respondent sought a temporary restraining order blocking implementation of the new regulations from the United States District Court for the District of Columbia. In an opinion delivered from the bench the same day, the District Court denied the requested order, noting that respondent had failed to show that irreparable harm would result from denial of the temporary restraining order. The court found that nothing "of any concrete nature [would occur] in the immediately foreseeable future which would be unable to be redressed in some form or another at some later time should the regulations go into effect."

Respondent appealed the decision of the District Court to the Court of Appeals for the District of Columbia Circuit and, at the same time, moved the Court of Appeals to enjoin implementation of the new regulations. On Saturday, June 29, 1985, a motions panel of the Court of Appeals ordered that respondent's emergency motion for injunctive relief be "held in abeyance" and that the District Court hear and decide by July 10, 1985, "any motion for a preliminary injunction." The court ordered "on its own motion," that the effective date of the proposed regulations be stayed until further order of that court. The court observed that respondent "may suffer irreparable injury in the absence of a stay" but did not identify that irreparable injury.

On July 2, 1985, OPM filed with me, as Circuit Justice for the District of Columbia Circuit, an application to vacate the order of the Court of Appeals. I granted the application on July 3, reciting in my order that a memorandum opinion would follow.

The Court of Appeals correctly acknowledged that the established rule is that denials of temporary restraining or-

ders are ordinarily not appealable. The court nonetheless asserted jurisdiction over the District Court's denial of the temporary restraining order in this case, holding that it falls within an exception to the general rule "because . . . [the new regulations] are now scheduled to become effective before any hearing on the preliminary injunction can be held." The court reasoned that because a hearing could not be held before the regulations went into effect, the District Court's denial of the temporary restraining order was tantamount to a denial of a preliminary injunction.

The principal authority relied on by the Court of Appeals in support of this exception to the general rule of unappealability is a footnote in our opinion in *Sampson* v. *Murray*, 415 U. S. 61, 86–87, n. 58 (1974).[6] The footnote from *Sampson* cited by the Court of Appeals merely quotes an opinion of the Court of Appeals for the Second Circuit in *Pan American World Airways* v. *Flight Engineers' Assn.*, 306 F. 2d 840, 843 (1962), to the effect that a temporary restraining order which is continued beyond the statutory period is appealable because it is, in effect, a preliminary injunction. In the present case, however, the District Court *denied* the temporary restraining order; a temporary restraining order was, therefore, not continued beyond the statutory period. The footnote in *Sampson* relied on by the Court of Appeals is simply irrelevant.

The Court of Appeals also relied on its own opinion in *Adams* v. *Vance*, 187 U. S. App. D. C. 41, 570 F. 2d 950 (1978), but this reliance is also misplaced. In *Adams*, the Court of Appeals held that it had jurisdiction over an appeal

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[6] In *Sampson*, we reversed a decision of the Court of Appeals for the District of Columbia Circuit which upheld a temporary injunction barring the dismissal of a federal employee. We held that loss of income to a dismissed federal employee, even when coupled with damage to reputation resulting from such dismissal, "falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case." 415 U. S., at 91–92.

from a grant of a temporary restraining order because the order in question "did not merely preserve the status quo pending further proceedings, but commanded an unprecedented action irreversibly altering" a delicate balance involving the foreign relations of the United States. *Id.*, at 44, 570 F. 2d, at 953. Again, however, in contrast to *Adams*, the District Court in this case *denied* the temporary restraining order. Its denial merely allows implementation of regulations in accordance with the express intent of Congress. Only if the District Court *granted* the temporary restraining order would it have disturbed the status quo. Moreover, the District Court's grant of a temporary restraining order in *Adams* was extraordinary. It "deeply intrude[d] into the core concerns of the executive branch," *id.*, at 45, 570 F. 2d, at 954, and "direct[ed] action . . . potent with consequences . . . irretrievable," *id.*, at 44, 570 F. 2d, at 953. The consequences of the District Court's order in the present case were not nearly so grave. And the opinion of the District Court explicitly contemplated a prompt hearing on a preliminary injunction. The District Court's denial of the temporary restraining order here was not in any sense a *de facto* denial of a preliminary injunction.[7]

The exception fashioned and relied on by the Court of Appeals is not supported by the authority cited; nor is there any independent basis on which jurisdiction could rest. I therefore conclude that the Court of Appeals had no jurisdiction to review the denial by the District Court of respondent's motion for a temporary restraining order. The Court of Appeals should have dismissed the appeal, thereby allowing respondent to proceed in the District Court on a motion for a preliminary injunction.

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[7] The Court of Appeals also cited to *Dilworth* v. *Riner*, 343 F. 2d 226, 229–230 (CA5 1965), to support its conclusion that, because the regulations would become effective before a preliminary injunction hearing could be held, the District Court's ruling was immediately appealable. *Dilworth* simply does not support this conclusion.

Possibly to ensure that it would retain jurisdiction over the disposition of the preliminary injunction motion which it ordered the District Court to hear and decide, the panel "held in abeyance" the motion for injunctive relief and issued what it termed an "administrative stay," in effect granting respondent more extensive relief than it had sought from the District Court. However, since the Court of Appeals was without jurisdiction over the appeal from the District Court's order denying the temporary restraining order, the motions panel was necessarily without authority to grant such a stay.

Accordingly, the order of the Court of Appeals is vacated.

BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* NORTH SIDE LUMBER CO. ET AL.

ON APPLICATION TO VACATE STAY

No. A-31. Decided July 24, 1985

An application by the Secretary of Agriculture to vacate the Court of Appeals' stay of the issuance of its own mandate is denied. The Court of Appeals had vacated the District Court's preliminary injunction against the Secretary's enforcing his contracts with respondent lumber company for the latter's harvesting of timber in national forests, but stayed the issuance of its mandate for 30 days to allow respondents to petition this Court for certiorari.

JUSTICE REHNQUIST, Circuit Justice.

The United States District Court for the District of Oregon preliminarily enjoined applicant John R. Block, Secretary of Agriculture, from enforcing contracts between him and respondent lumber company. These contracts required the latter to harvest timber in national forests. The Court of Appeals for the Ninth Circuit vacated the injunction holding that the Tucker Act, 28 U. S. C. §§ 1346 and 1491, impliedly barred the grant of such relief. The Court of Appeals stayed the issuance of this mandate for 30 days so that respondents might petition this Court for certiorari. The Secretary requests that I vacate that stay because of the prospect of continuing deterioration of abandoned timber on the ground. Respondents dispute this factual claim.

The District Court held that the "equity" favored respondents, and the Court of Appeals by staying issuance of the mandate even after vacating the injunction, must have agreed with the District Court on this point. The Secretary has furnished me no basis for disturbing their conclusion in this highly factual issue. The application is accordingly denied.

HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* REDBUD HOSPITAL DISTRICT

ON APPLICATION FOR STAY

No. A–32. Decided July 24, 1985

An application by the Secretary of Health and Human Services to stay, pending her appeal to the Court of Appeals, the District Court's "preliminary injunction" is granted insofar as it required her to promulgate nationwide regulations providing hospitals with rights to immediate review of their individual Medicare reimbursement rates and with enhanced reimbursement for inpatient services. If the Court of Appeals were to affirm the District Court's use of a "preliminary injunction" to require the Secretary to issue nationwide regulations, at least four Members of this Court would probably vote to grant certiorari. Moreover, it does not appear that the District Court had authority to order such sweeping "preliminary" relief, and the "stay equities" favor the Secretary. However, it does not appear likely that four Members of this Court would grant review of the issues presented by that portion of the District Court's order granting preliminary relief to respondent operator of a hospital, which had filed the suit only to challenge the administrative determination of its own Medicare reimbursement rate and to obtain additional reimbursement. Accordingly, the application for a stay is denied with respect to the latter portion of the District Court's preliminary injunction.

JUSTICE REHNQUIST, Circuit Justice.

Applicant, the Secretary of Health and Human Services (Secretary), asks that I stay an order entered by the United States District Court for the Northern District of California pending disposition of her appeal to the Court of Appeals for the Ninth Circuit. This suit began as a challenge by the operator of a single hospital, Redbud Hospital District (Redbud), to its Medicare reimbursement rate. In addition to affording Redbud itself preliminary relief, the District Court, in a "preliminary injunction" dated July 30, 1984, and a "modification" of that injunction dated June 14, 1985, required the Secretary to promulgate, by July 1, 1985, nation-

wide regulations providing hospitals like Redbud with rights to immediate administrative review and enhanced reimbursement for inpatient services. On June 28, 1985, a two-judge panel of the Ninth Circuit denied the Secretary's request for an emergency stay. On July 1, 1985, the Secretary published the regulations in question "under protest." 50 Fed. Reg. 27208, to be codified in 42 CFR § 412. Absent a stay, these regulations will go into effect on August 1, 1985. After considering both the Secretary's application and Redbud's response, I have decided to grant in part and deny in part the Secretary's request for a stay.

Section 1886(d) of the Social Security Act, added by the Social Security Amendments Act of 1983, Pub. L. 98–21, 97 Stat. 152, 42 U. S. C. § 1395ww(d) (1982 ed., Supp. I), established a prospective payment system (PPS) for Medicare payment to hospitals furnishing inpatient services to Medicare beneficiaries. Under this system, payment is made at a predetermined rate for each hospital discharge. The rate is based in part on a "hospital specific" rate, which in turn is based on the hospital's actual operating costs during a particular "base year." See 42 U. S. C. § 1395ww(d)(1) (1982 ed., Supp. I). The Secretary has delegated to "fiscal intermediaries" the responsibility for calculating the hospital-specific rate for each of the hospitals participating in the Medicare program.

Redbud, the operator of a sole community hospital in Cleardale, California, brought this suit against the Secretary on June 26, 1984, challenging the fiscal intermediary's determination of Redbud's hospital-specific rate. Redbud alleged that it would suffer losses of approximately $20,000 per month unless its hospital-specific rate were adjusted to reflect recent capital improvements completed after the close of its base year. In its prayer for relief, Redbud requested (1) a declaratory judgment that the Secretary must allow the intermediary to adjust Redbud's hospital-specific rate to account for costs not reflected in the base year, (2) a preliminary and permanent injunction barring the Secretary

"from implementing Medicare reimbursement to Redbud under PPS unless such reimbursement accounts for" those costs, and (3) an order requiring the Secretary "to instruct the intermediary to account for [those] costs." Redbud did not seek the promulgation of nationwide regulations.

The Secretary moved to dismiss the complaint on the ground that Redbud had not obtained a final agency determination properly subject to either administrative or judicial review, and that the court therefore had no jurisdiction over Redbud's claim. Apparently in response to this motion, Redbud then requested a hearing before the Provider Reimbursement Review Board (Board) to review the intermediary's refusal to make the requested adjustments to Redbud's hospital-specific rate. On July 17, 1984, the Board sent a response stating that, pursuant to a ruling of the Health Care Financing Administration, 49 Fed. Reg. 22413 (1984), it was "unable to accept" Redbud's request for a hearing because that request was premature. On July 30, 1984, the District Court denied the Secretary's motion to dismiss, holding that it had "jurisdiction under 42 U. S. C. § 1395*oo* to review the Board's decision of July 17, 1984." The District Court went on to state that it "also has jurisdiction under the All Writs Act to issue an injunction maintaining the status quo in this case pending agency action." Relying on these jurisdictional findings, the District Court then entered a "preliminary injunction" that "remanded" the case to the Secretary with instructions to promulgate "regulations or written policies" that (a) "take into account" the "extraordinary and unusual costs not necessarily reflected in a hospital's base year costs"; (b) "take into account the special needs of hospitals serving a disproportionate number of Medicare and low-income patients"; (c) "take into account . . . the special needs of sole community hospitals and the unique effects of their status upon the hospital-specific rate"; and (d) "provide for timely and reasonable review" of intermediary estimates of hospital-specific rates under the PPS program. As to Redbud itself,

the District Court ordered Redbud's intermediary to "reconsider" its estimate of Redbud's hospital-specific rate

> "in light of regulations promulgated in accordance with the foregoing.
>
> "Pending compliance with this order and until further order of the court, defendant is enjoined from imposing the pre-payment system upon [Redbud] or otherwise reducing [Redbud]'s current level of reimbursement."

No date was set for compliance with the "preliminary injunction."

In the spring of 1985, the parties filed a number of motions in the District Court, all of which were heard on May 20, 1985. Redbud asked, *inter alia*, that the court modify the "preliminary injunction" by requiring the Secretary to publish, by July 1, 1985, the "regulations or written policies" described in the court's original order. The Secretary moved to dissolve the injunction, renewing her argument that the District Court lacked jurisdiction.

At the May 20 hearing, the District Court stated that it would grant Redbud's motion "to modify the preliminary injunction." On June 14, 1985, the District Court entered an order stating that "[t]he following paragraph will be added to this court's July 1984 order:

> "The Secretary shall publish these implementing regulations in the *Federal Register* as an interim final rule by no later than July 1, 1985, effective August 1, 1985. A 45-day comment period shall follow publication of the interim final rule. The regulations shall be published in the *Federal Register* as a final rule no later than October 1, 1985."

The obligation of a Circuit Justice in considering the usual stay application is "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final

outcome of the case in this Court." *Gregory-Portland Independent School District* v. *United States*, 448 U. S. 1342 (1980) (REHNQUIST, J., in chambers). In this case, however, the Secretary is not asking for the usual stay of a judgment of the Court of Appeals pending the disposition of a petition for certiorari in this Court. She asks instead that I grant a stay of the District Court's order pending appeal to the Ninth Circuit when the Ninth Circuit itself has refused to issue the stay. As is often noted, "'a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted.'" *Atiyeh* v. *Capps*, 449 U. S. 1312, 1313 (1981) (REHNQUIST, J., in chambers) (quoting *Pasadena Board of Education* v. *Spangler*, 423 U. S. 1335, 1336 (1975) (REHNQUIST, J., in chambers)). Nevertheless, for the reasons set out below, I believe that the present case is sufficiently unusual to warrant granting a partial stay of the District Court's order.

In arguing for a stay, the Secretary contends that there is a "strong probability" that the District Court's order will be overturned on one of three distinct grounds. First, she claims that the District Court exceeded its jurisdiction in reaching the merits of Redbud's claim for additional reimbursement. Even if the Board's July 17, 1984, ruling that Redbud's administrative claim was premature is a judicially reviewable final decision under 42 U. S. C. § 1395*oo*(f) (1982 ed., Supp. I), the scope of the District Court's review was limited to the Board's own jurisdictional determination. Second, the Secretary argues that the District Court's use of a "preliminary injunction" to compel "publication of nationwide regulations is unprecedented, unwarranted, and a clear abuse of the court's power to fashion preliminary relief." And third, the Secretary asserts that in deeming the regulations in question mandated by Congress the District Court "clearly misconstrued" the relevant provisions of the Medicare statute.

However the Ninth Circuit may decide these questions on appeal, I am not at all certain that four Members of this

Court would be inclined to review either the "finality" of the Board's July 17, 1984, ruling or the District Court's conclusions on the merits. I do believe, however, that the District Court's use of a "preliminary injunction" to require the Secretary to issue regulations of nationwide application would prompt at least four Members of this Court to grant review should the Court of Appeals affirm that aspect of the District Court's order.

Federal district courts have jurisdiction under 42 U. S. C. § 1395*oo*(f) (1982 ed., Supp. I) to review "any final decision of the Board" in suits brought by providers of Medicare services such as Redbud. Judicial review under § 1395*oo*(f) is sharply circumscribed, however, see, *e. g.*, *V. N. A. of Greater Tift County, Inc.* v. *Heckler*, 711 F. 2d 1020, 1024–1027 (CA11 1983), and I am persuaded that the section does not authorize the kind of sweeping "preliminary" relief awarded by the District Court here. Nor do I believe that such relief is authorized, as the District Court thought, by the All Writs Act, 28 U. S. C. § 1651(a), which encompasses a limited judicial power to preserve the status quo while administrative proceedings are in progress and to prevent impairment of the effective exercise of appellate jurisdiction. See *FTC* v. *Dean Foods Co.*, 384 U. S. 597, 603–604 (1966). The District Court's requirement that the Secretary promulgate new nationwide regulations cannot possibly be justified as necessary to preserve the status quo. Redbud's interest in maintaining the status quo is protected by that part of the District Court's order, which I do not stay, that enjoins the Secretary from applying the prospective payment system to Redbud or "otherwise reducing [Redbud]'s current level of reimbursement" without making the requested adjustments. In its complaint Redbud did not even seek regulatory reform. Nor can I view the regulations as in any way necessary to the effective exercise of appellate jurisdiction. The District Court's July 30, 1984, and June 14, 1985, orders, in combination, are a far cry from "the usual 'prohibitory' injunction which merely freezes the positions of the parties until the

court can hear the case on the merits." *Heckler* v. *Lopez*, 463 U. S. 1328, 1333 (1983) (REHNQUIST, J., in chambers). Plainly, I think, the District Court has inappropriately used its "preliminary injunction" as a vehicle for final relief on the merits. *University of Texas* v. *Camenisch*, 451 U. S. 390, 395 (1981).

The new regulations will at least require significant readjustment in the administration of PPS and will therefore cause hardship to the applicant. More important, the District Court's requirement that the Secretary promulgate new regulations is plainly not necessary to protect Redbud's interests in this litigation. I think the "stay equities" favor the applicant.

Accordingly, I grant the application of the Secretary to stay the preliminary injunction of the District Court, as modified, pending determination of the Secretary's appeal by the Court of Appeals for the Ninth Circuit, but only insofar as the injunction orders the Secretary to promulgate and apply nationwide regulations. In all other respects the application for a stay is denied.

CITY OF RIVERSIDE ET AL. *v.* RIVERA ET AL.

ON APPLICATION FOR STAY

No. A–122. Decided August 28, 1985

An application by the city of Riverside and five of its current or former police officers to stay, pending disposition of their petition for certiorari, the Court of Appeals' mandate requiring applicants to pay respondents $245,456.25 in attorney's fees, is granted. The Court of Appeals had affirmed the fees award made by the District Court, pursuant to 42 U. S. C. § 1988, following a trial in which respondents recovered from applicants a total of $33,350 in damages based on, *inter alia*, violations of 42 U. S. C. § 1983 arising from the conduct of the police in forcibly breaking up a private party that respondents were attending and in arresting some of the respondents. Applicants' petition for certiorari, as well as the petition for certiorari in another case before this Court, raises a significant question as to whether, in determining the amount of "a reasonable attorney's fee" under § 1988, the disproportionality between a large attorney's fee award and the amount of monetary damages recovered should be considered. It is likely that four Members of the Court will vote to grant certiorari in one of the cases and to postpone consideration of the petition in the other pending plenary review of the first. Moreover, the probability of applicants' succeeding on the merits is substantial.

JUSTICE REHNQUIST, Circuit Justice.

Applicants, the city of Riverside and five of its current or former police officers, ask that I stay pending disposition of their petition for certiorari the mandate of the Court of Appeals for the Ninth Circuit requiring applicants to pay respondents $245,456.25 in attorney's fees. The attorney's fees were awarded by the District Court pursuant to 42 U. S. C. § 1988, following a trial in which respondents recovered from applicants a total of $33,350 in damages. This case seems to me to present a significant question involving the construction of § 1988: should a court, in determining the amount of "a reasonable attorney's fee" under the statute, consider the amount of monetary damages recovered in

the underlying action? On August 15, 1985, I temporarily stayed the Ninth Circuit's mandate in order to permit further study of the stay application, the response thereto, and the petition for certiorari. Having fully considered the parties' submissions, I now grant the requested stay.

On August 1, 1975, respondents were attending a large private party in the Latino section of Riverside when numerous police officers entered, forcibly broke up the party, and arrested many of the guests, including four of the respondents. The four respondents who were arrested were later prosecuted, but the charges were dismissed for lack of probable cause. Respondents, in turn, filed suit against the city of Riverside, its Chief of Police, and 30 police officers, alleging violations of the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, violations of 42 U. S. C. §§ 1981, 1983, 1985(3), and 1986, and pendent state claims for conspiracy, emotional distress, assault and battery, bodily injury, property damage, breaking and entering a residence, malicious prosecution, defamation, false arrest and imprisonment, and negligence. Respondents sought compensatory and punitive damages, injunctive and declaratory relief, and attorney's fees.

Prior to trial, respondents dropped their requests for injunctive and declaratory relief, along with their original allegation that the police officers had acted with discriminatory intent. Also prior to trial, 17 of the individual defendants were dismissed on motions for summary judgment. After a 9-day trial, the jury returned a verdict exonerating another 9 of the individual defendants from liability, and awarding $33,350 to respondents based on 11 violations of § 1983, 4 instances of false arrest and imprisonment, and 22 instances of common negligence. Respondents did not prevail on any of their remaining theories of liability, no restraining orders or injunctions were ever issued against any of the defendants, and the city of Riverside was not compelled to, and did not, change any of its practices or policies as a result of the suit.

Respondents filed a post-trial motion for attorney's fees pursuant to § 1988. Following the submission of affidavits documenting the hours spent on the case by counsel for respondents, the District Court awarded respondents $245,456.25 in attorney's fees. Applicants appealed the award, and the Court of Appeals affirmed. *Rivera* v. *City of Riverside*, 679 F. 2d 795 (1982). We granted certiorari, vacated the judgment, and remanded the case for further consideration in light of our then recent decision in *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983). *City of Riverside* v. *Rivera*, 461 U. S. 952 (1983). On remand, and after a brief hearing, the District Court again awarded respondents $245,456.25 in attorney's fees, and the Court of Appeals again affirmed, this time in an unpublished opinion. The Court of Appeals also denied applicants' motion for a stay pending the disposition by this Court of a petition for certiorari.

At each stage of the proceedings in this case, applicants have challenged the attorney's fee award on the ground that it is disproportionately large in comparison to the amount of the monetary judgment recovered. In the District Court, in opposition to respondents' initial request for nearly $500,000 in attorney's fees, applicants cited *Scott* v. *Bradley*, 455 F. Supp. 672 (ED Va. 1978), for the contention that "there is no reason to provide an economic windfall to Plaintiffs' counsel by awarding them sixteen times the award received by Plaintiffs in the instant action." App. to Pet. for Cert. 10–21. The opinion of the Court of Appeals on the first appeal states that "[a]ppellants urge this court to reduce the amount awarded . . . because the attorney's fees were disproportionately larger than the jury verdict." *Rivera* v. *City of Riverside*, 679 F. 2d, at 797. The Court of Appeals rejected the disproportionality argument, however, holding that "[t]he extent to which a plaintiff has 'prevailed' is not necessarily reflected in the amount of the jury verdict." *Id.*, at 798. Applicants in their petition for certiorari to this Court have

framed the more general question of "the proper standards within which a district court may exercise its discretion in awarding attorney's fees to prevailing parties under § 1988," but although such a formulation is not a model of specificity, it does "fairly subsume," *inter alia*, the disproportionality issue.

There is also presently pending before this Court a petition for certiorari in the case of *City of McKeesport* v. *Cunningham*, No. 84–1793, which raises the same issue as to disproportionality between the amount of a money judgment recovered and the size of the attorney's fee award under § 1988. In that case the District Court entered judgment for the plaintiff in the amount of $17,000 as damages for the taking of property without due process of law, and plaintiff then moved for an award of some $35,000 in attorney's fees and costs based on time spent on the case. The District Court, after review of the relevant materials, reduced the amount of the requested award because, among other things, the plaintiff's lawsuit created no new law and was unlikely to benefit anyone but the plaintiff. On appeal, the Court of Appeals for the Third Circuit reversed, holding that the District Court was wrong in applying what the Court of Appeals characterized as a "negative multiplier" based on the low value of the lawsuit to the general public. *Cunningham* v. *City of McKeesport*, 753 F. 2d 262, 268–269 (1985). The Court of Appeals directed that the plaintiffs recover the full amount of attorney's fees claimed.

In my view, the question of the proportionality of § 1988 attorney's fees to the amount of the monetary judgment awarded, a question which seems to me to be presented by each of these cases, is likely to command the votes of four Members of the Court to grant certiorari in one of the cases and to postpone consideration of the certiorari petition in the other pending plenary review of the first. I also think, for the reasons hereafter stated, that the probability of applicants' succeeding on the merits is substantial. As we have

previously acknowledged, § 1988 was enacted "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley*, *supra*, at 429 (quoting H. R. Rep. No. 94–1558, p. 1 (1976)). At the same time, the statute authorizes only the award of "reasonable" attorney's fees, reflecting Congress' intent that such fees be "adequate to attract competent counsel," yet not so large as to "produce windfalls to attorneys." S. Rep. No. 94–1011, p. 6 (1976); see also H. R. Rep. No. 94–1558, *supra*, at 9. I think the award of attorney's fees in this case, representing more than seven times the amount of the monetary judgment obtained, is so disproportionately large that it could hardly be described as "reasonable."

The question of what is a "reasonable" attorney's fee involves substantial elements of judgment and discretion in the district court, but Congress has provided the courts with some guidelines for the exercise of this judgment and discretion. The Senate and House Reports accompanying § 1988 refer the courts to the 12 factors identified in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (CA5 1974). Those factors include "the amount involved and the results obtained." *Hensley*, *supra*, at 430, n. 3. Perhaps more important, the House Committee on the Judiciary, in citing *Johnson*, chose to highlight the following five factors: "the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work, *and the amount received in damages, if any.*" H. R. Rep. No. 94–1558, *supra*, at 8 (emphasis supplied).

Despite this seemingly clear statement of legislative intent, however, other Courts of Appeals in addition to the Ninth Circuit have held not only that the amount of damages received is not a *mandatory* consideration in awarding attorney's fees under § 1988, but that it is not even a *permissible* one. For example, in *DiFilippo* v. *Morizio*, 759 F. 2d 231 (1985), the Second Circuit held: "We believe a reduction

made on the grounds of a low award to be error unless the size of the award is the result of the quality of representation." *Id.*, at 235. Similarly, in *Ramos* v. *Lamm*, 713 F. 2d 546 (1983), the Tenth Circuit stated: "Some courts have reduced fees when the thrust of the suit was for monetary recovery and the recovery was small compared to the fees counsel would have received if compensated at a normal rate for hours reasonably expended. We reject this practice." *Id.*, at 557. Other courts, including the Seventh Circuit, have taken the opposite view. See, *e. g.*, *Bonner* v. *Coughlin*, 657 F. 2d 931, 934 (1981) ("[T]he nominal nature of the damages is a factor to be considered in determining the amount of the award. . . . The amount recovered may sometimes indicate the reasonableness of the time spent to vindicate the right violated"); *Scott* v. *Bradley*, 455 F. Supp., at 675.

This Court has already recognized that "[t]he product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U. S., at 434. Similarly, in *Blum* v. *Stenson*, 465 U. S. 886 (1984), we explained that "there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high." *Id.*, at 897. Neither *Hensley* nor *Blum*, however, addressed whether disproportionality between the amount of the monetary judgment obtained and the amount of the attorney's fee, standing alone, is a consideration that might properly lead a court to reduce the fee.

This is not to suggest that substantial attorney's fees cannot be awarded in cases involving primarily injunctive or other nonpecuniary relief, see S. Rep. No. 94–1011, *supra*, at 6 ("It is intended that the amount of fees . . . not be reduced because the rights involved may be nonpecuniary in

nature"); H. R. Rep. No. 94–1558, *supra*, at 9. Nor would an unusually large attorney's fee necessarily be inappropriate where a defendant's bad-faith conduct requires plaintiff's counsel to spend an inordinate amount of time on a case. But in this case and in *City of McKeesport*, there are only monetary judgments, and it is difficult for me to believe that Congress intended by § 1988 to authorize a prevailing plaintiff to obtain more generous court-ordered attorney's fees from a defendant than the plaintiff's attorney might himself have fairly charged to the plaintiff in the absence of a fee-shifting statute. The billing experience I gained in 16 years of private practice strongly suggests to me that a very reasonable client might seriously question an attorney's bill of $245,000 for services which had resulted solely in a monetary award of less than $34,000. In this sense nearly all fees are to a certain extent "contingent," because the time billed for a lawsuit must bear a reasonable relationship not only to the difficulty of the issues involved but to the amount to be gained or lost by the client in the event of success or failure. Nothing in the language of § 1988 or in the legislative history set forth above satisfies me that Congress intended to dispense with this element of billing judgment when a court fixes attorney's fees pursuant to the statute.

Thus, I conclude that it is likely that certiorari will be granted in either this case or *City of McKeesport*, or both, and that the likelihood of applicants' prevailing on the merits is sufficiently great to warrant the granting of a stay. Respondents contend that the supersedeas bond previously posted by applicants is inadequate to cover interest on the amount of the judgment, but this is an issue which may more properly be addressed in the first instance by the District Court.

RENAISSANCE ARCADE AND BOOKSTORE ET AL. *v.* COUNTY OF COOK ET AL.

ON APPLICATION FOR STAY

No. A–173. Decided September 5, 1985

An application to stay an Illinois county trial court's permanent injunction prohibiting petitioners from operating their adult bookstores in certain areas of the county—both the Appellate Court and the Supreme Court of Illinois having denied motions to stay the injunction pending appellate review—is denied.

JUSTICE STEVENS, Circuit Justice.

On March 8, 1985, the Circuit Court of Cook County entered a permanent injunction which prohibits petitioners from operating their adult bookstores in certain unincorporated areas of Cook County, Illinois.* Petitioners' appeal from the injunction is currently pending in the Appellate Court of Illinois for the First Judicial District. On March 20, 1985, that court denied petitioners' motion for a stay of the injunction pending appellate review. On April 22, 1985, the Illinois Supreme Court likewise entered an order denying petitioners' motion to stay enforcement of the injunction pending review.

Petitioners filed an application for a stay with me in my capacity as Circuit Justice for the Seventh Circuit on August

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*The authority for the Circuit Court's injunction is a zoning ordinance adopted by the Cook County Board of Commissioners which restricts "adult uses" and defines one such use, an "adult book store," as:

"An establishment having as a substantial or significant portion of its stock in trade books, magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' or an establishment with a segment or section devoted to the sale or display of such material." County of Cook, Ill., Zoning Ordinance, § 14.2 (1976), reprinted in Application, Exh. A2.

In their application, petitioners represent that their stay request "only concerns itself with the rights of adult bookstores." *Id.*, ¶ 19.

29, 1985. Because the application was not filed within 90 days of the Illinois Supreme Court's April 22, 1985, order, however, neither this Court nor a Justice thereof has the authority to treat the application as a petition for certiorari to review "the merits of petitioners' claim that the outstanding injunction will deprive them of rights protected by the First Amendment during the period of appellate review," *National Socialist Party* v. *Skokie*, 432 U. S. 43, 44 (1977) *(per curiam)*. See 28 U. S. C. § 2101(c). Moreover, because the application does not indicate that the appeal will become moot unless a stay is granted, it does not appear that an extraordinary writ may be issued pursuant to 28 U. S. C. § 1651 in aid of this Court's appellate jurisdiction. Accordingly, the application is denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 1982, 1983, AND 1984

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
Terms	1982	1983	1984	1982	1983	1984	1982	1983	1984	1982	1983	1984
Number of cases on dockets	17	18	15	2,710	2,688	2,575	2,352	2,394	2,416	5,079	5,100	5,006
Number disposed of during terms	3	7	8	2,190	2,148	2,175	2,008	1,985	2,078	4,201	4,140	4,261
Number remaining on dockets	14	11	7	520	540	400	344	409	338	878	960	745

	TERMS		
	1982	1983	1984
Cases argued during term	183	184	175
Number disposed of by full opinions	174	174	159
Number disposed of by per curiam opinions	6	6	11
Number set for reargument	3	4	5
Cases granted review this term	183	152	185
Cases reviewed and decided without oral argument	135	86	82
Total cases to be available for argument at outset of following term	113	80	87

JULY 2, 1985

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CONSTITUTIONAL LAW—Continued.
authorizing a rectal examination, (3) during such detention, she accepted option of returning to Colombia, but officials could not place her on next available flight and she refused to use monitored toilet facilities, and (4) pursuant to a court order, a rectal examination at a hospital resulted in obtaining cocaine-filled balloons that had been smuggled in her alimentary canal, detention did not violate Fourth Amendment since, under facts surrounding respondent and her trip, officials reasonably suspected that she was an "alimentary canal" smuggler. United States v. Montoya de Hernandez, p. 531.

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FEDERAL ARBITRATION ACT—Continued.
had arisen, and (4) respondent's counterclaims asserted antitrust causes of action, antitrust claims were arbitrable pursuant to Act, even though arbitration clause did not mention federal antitrust statutes specified in respondent's counterclaims. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., p. 614.

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FOURTH AMENDMENT. See **Constitutional Law, V.**

FRAUD. See **Criminal Law.**

FREEDOM OF RELIGION. See **Constitutional Law, III.**

FREEDOM OF SPEECH. See **Constitutional Law, IV.**

FUNGICIDE REGISTRATION. See **Federal Insecticide, Fungicide, and Rodenticide Act.**

GOVERNMENT EMPLOYEES. See **Stays, 5.**

GROUP HOMES FOR MENTALLY RETARDED. See **Constitutional Law, II.**

HANDICAPPED PERSONS. See **Constitutional Law, VI.**

HOMES FOR MENTALLY RETARDED. See **Constitutional Law, II.**

HOSPITALS' MEDICARE REIMBURSEMENTS. See **Stays, 3.**

HUNTING RIGHTS. See **Indians.**

IMMUNITY OF STATES FROM SUIT. See **Civil Rights Attorney's Fees Awards Act of 1976; Constitutional Law, VI.**

IMPEACHMENT OF WITNESSES. See **Constitutional Law, I, 1.**

IMPLIED CAUSES OF ACTION. See **Employee Retirement Income Security Act of 1974.**

INDIANS.

Hunting and fishing rights—Regulation by State.—In light of terms of a 1901 Agreement between Federal Government and respondent Tribe, an 1864 Treaty, and certain other events in Tribe's history, Tribe's exclusive right to hunt and fish on lands in Oregon reserved to Tribe by 1864 Treaty did not survive as a special right to be free of state regulation in lands ceded to Federal Government that were outside Tribe's reservation after 1901 Agreement. Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, p. 753.

INJUNCTIONS. See **Jurisdiction.**

INSECTICIDE REGISTRATION. See **Federal Insecticide, Fungicide, and Rodenticide Act.**

INTERNATIONAL RELATIONS. See **Federal Arbitration Act.**

INTERSTATE AGREEMENT ON DETAINERS.

Detainer based on probation violation—Applicability of Agreement.—Article III of Agreement, establishing a procedure by which a prisoner incarcerated in one State may demand speedy disposition of "any untried indictment, information or complaint" that is basis of a detainer lodged against him by another State, does not apply to detainers based on probation-violation charges in latter State. Carchman v. Nash, p. 716.

INTERSTATE TRANSPORTATION OF STOLEN GOODS. See **Criminal Law.**

JURISDICTION.

Supreme Court—Constitutionality of federal statute—Preliminary injunction.—This Court has jurisdiction under 28 U. S. C. § 1252 of an appeal from Federal District Court's nationwide preliminary injunction against enforcement of another federal statute's $10 limitation of fee that may be paid an attorney or agent who represents a veteran seeking benefits from Veterans' Administration for service-connected disability or death, in appellees' action alleging that fee limitation violated First Amendment and Due Process Clause of Fifth Amendment. Walters v. National Assn. of Radiation Survivors, p. 305.

JUSTICIABILITY. See also **Federal Insecticide, Fungicide, and Rodenticide Act.**

Zoning regulations—Prematurity of constitutional claims.—In respondent landowner's suit against petitioner Planning Commission—alleging that Just Compensation Clause of Fifth Amendment was violated where petitioner, in 1973, approved a plat for development of tract in accordance with zoning regulations but, in 1979, disapproved further development of tract because of failure to comply with later zoning regulations—claim was premature since respondent (1) by failing to seek variances from regulations, had not obtained a final decision regarding application of regulations to its property and (2) had not utilized state procedures for obtaining just compensation; respondent's claim also was premature if viewed as asserting an exercise of police power violative of Due Process Clause of Fourteenth Amendment. Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, p. 172.

LABOR UNIONS. See **National Labor Relations Act.**

LEGAL DEFENSE ORGANIZATIONS. See **Constitutional Law, IV.**

LONGSHOREMEN'S HANDLING OF CARGO CONTAINERS. See **National Labor Relations Act, 1.**

MARINE CARGO CONTAINERS. See **National Labor Relations Act, 1.**

MEDICARE. See **Stays, 3.**

MENTALLY RETARDED. See **Constitutional Law, II.**

MILITARY FORCES. See **Constitutional Law, I, 2; Federal Tort Claims Act; Jurisdiction.**

MURDER OF SERVICEMAN BY ANOTHER SERVICEMAN. See **Federal Tort Claims Act.**

NATIONAL FORESTS. See **Stays, 4.**

NATIONAL LABOR RELATIONS ACT.

1. *Secondary activity—Marine cargo containers—Handling by longshoremen.*—Where respondent union collectively bargained for "container" rules requiring that certain marine cargo containers be loaded or unloaded by longshoremen at pier, National Labor Relations Board erred in holding that such rules constituted unlawful secondary activity under §§ 8(b)(4)(B) and 8(e) of Act when applied to containers destined either for warehousers who traditionally handled cargo for reasons unrelated to marine transportation or for truckers who normally handled cargo in pier's vicinity for reasons relating to trucking requirements, since rules constituted a lawful agreement to preserve work that had been performed by longshoremen before "containerization" of cargo. NLRB v. Longshoremen, p. 61.

2. *Strikes—Resignation from union—Fines.*—National Labor Relations Board did not err in concluding that petitioner unions committed an unfair labor practice under § 8(b)(1)(A) of Act by fining members who, contrary to petitioner national union's constitution, resigned from union during a strike and returned to work. Pattern Makers v. NLRB, p. 95.

NATIONAL LABOR RELATIONS BOARD. See **National Labor Relations Act.**

OFFICE OF PERSONNEL MANAGEMENT. See **Stays, 5.**

OREGON. See **Indians.**

PAROCHIAL SCHOOLS' RECEIPT OF PUBLIC AID. See **Constitutional Law, III.**

PHONORECORDS. See **Criminal Law.**

POLITICAL ADVOCACY ORGANIZATIONS. See **Constitutional Law, IV.**

PRELIMINARY INJUNCTIONS. See **Jurisdiction.**

PREMATURITY OF ACTIONS. See **Federal Insecticide, Fungicide, and Rodenticide Act; Justiciability.**

PRIVATE CIVIL ACTION BY VICTIM OF CRIME. See **Racketeer Influenced and Corrupt Organizations Act.**

PROBATION VIOLATIONS. See **Interstate Agreement on Detainers.**

PRODUCT SAFETY. See **Federal Insecticide, Fungicide, and Rodenticide Act.**

PROSECUTOR'S FAILURE TO DISCLOSE EVIDENCE TO DEFENDANT. See **Constitutional Law, I, 1.**

PUBLIC EMPLOYEES. See **Stays, 5.**

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.

1. *Victim's private civil action—Injury from conduct of an enterprise.*—In respondents' private civil action against petitioners under Act, there was no merit to argument that respondents' injury must flow not from predicate offenses, specified in Act, but from fact that they were performed as part of conduct of an enterprise; contention that complaint did not adequately allege a violation of Act because respondents had not shown that enterprise was "conducted" through a pattern of racketeering activity was not considered by this Court since issue was not raised or addressed in courts below and was not included in question presented by petition for certiorari, as required by this Court's Rule 21.1(a). American National Bank & Trust Co. of Chicago v. Haroco, Inc., p. 606.

2. *Victim's private civil action—Prior conviction of defendant—Racketeering injury.*—Under Act's provisions that define "racketeering activity" as including acts "indictable" under other specific federal criminal provisions, and that authorize a private civil action by a person injured by another's violation of Act's prohibition against participating in an enterprise "through a pattern of racketeering activity," there is no requirement (1) that a private action can proceed only against a defendant who has already been convicted of a predicate act or of a violation of Act, or (2) that in order to maintain a private action plaintiff must establish a "racketeering injury" rather than only an injury resulting from predicate acts themselves. Sedima, S. P. R. L. v. Imrex Co., p. 479.

REGISTRATION OF INSECTICIDES, FUNGICIDES, AND RODENTICIDES. See **Federal Insecticide, Fungicide, and Rodenticide Act.**

REHABILITATION ACT OF 1973. See **Constitutional Law, VI.**

RELIGIOUS FREEDOM. See **Constitutional Law, III.**

RESIGNATION FROM UNION. See **National Labor Relations Act, 2.**

RETIREMENT PLANS. See **Employee Retirement Income Security Act of 1974.**

RODENTICIDE REGISTRATION. See **Federal Insecticide, Fungicide, and Rodenticide Act.**

SCHOOL DISTRICTS' PROGRAMS FOR NONPUBLIC SCHOOL STUDENTS. See **Constitutional Law, III, 2.**

SEARCHES AND SEIZURES. See **Constitutional Law, V.**

SECONDARY ACTIVITIES. See **National Labor Relations Act, 1.**

SECRETARY OF AGRICULTURE. See **Stays, 4.**

SECRETARY OF HEALTH AND HUMAN SERVICES. See **Stays, 3.**

SERVICEMEN. See **Constitutional Law, I, 2; Federal Tort Claims Act; Jurisdiction.**

SETTLEMENT OFFERS. See **Attorney's Fees.**

SHERMAN ACT. See **Federal Arbitration Act.**

SMUGGLING NARCOTICS IN ALIMENTARY CANAL. See **Constitutional Law, V.**

STATES' IMMUNITY FROM SUIT. See **Civil Rights Attorney's Fees Awards Act of 1976; Constitutional Law, VI.**

STATES' LIABILITY FOR ATTORNEY'S FEES IN ACTIONS AGAINST STATE OFFICIALS. See **Civil Rights Attorney's Fees Awards Act of 1976.**

STAYS.

1. *Adult bookstores.*—Application to stay county trial court's permanent injunction prohibiting operation of applicants' adult bookstores in certain areas of county is denied. Renaissance Arcade and Bookstore v. Cook County (STEVENS, J., in chambers), p. 1322.

2. *Attorney's fees.*—Application to stay, pending certiorari, Court of Appeals' mandate requiring applicants, a city and certain of its current or former police officers, to pay, pursuant to 42 U. S. C. § 1988, $245,456.25 in attorney's fees to respondents—who had recovered only $33,350 in damages in their civil rignts action based on police misconduct in breaking up, and making arrests at, a private celebration—is granted. Riverside v. Rivera (REHNQUIST, J., in chambers), p. 1315.

3. *Medicare regulations.*—Application to stay, pending appeal to Court of Appeals, District Court's preliminary injunction is granted insofar as injunction required Secretary of Health and Human Services to promulgate nationwide regulations providing hospitals with rights to immediate review of their individual Medicare reimbursement rates and with enhanced reimbursement for inpatient services; but stay application is denied with respect to portion of District Court's order granting preliminary relief to respondent hospital operator, which had filed suit only to challenge administrative determination of its own Medicare reimbursement rate and to obtain additional reimbursement. Heckler v. Redbud Hospital Dist. (REHNQUIST, J., in chambers), p. 1308.

STAYS—Continued.

4. *Vacation of stay—Harvesting timber in national forests.*—Secretary of Agriculture's application to vacate Court of Appeals' stay of issuance of its own mandate for 30 days to allow respondents to petition this Court for certiorari—Court of Appeals having vacated District Court's preliminary injunction against Secretary's enforcing his contracts with respondent lumber company for latter's harvesting of timber in national forests—is denied. Block v. North Side Lumber Co. (REHNQUIST, J., in chambers), p. 1307.

5. *Vacation of stay—OPM regulations.*—Application to vacate Court of Appeals' order directing a stay of effective date of Office of Personnel Management's new regulations—which allow federal agencies to give more weight to merit and less weight to seniority in personnel decisions—is granted. Office of Personnel Management v. Government Employees (BURGER, C. J., in chambers), p. 1301.

STOLEN GOODS. See **Criminal Law.**

STRIKES. See **National Labor Relations Act,** 2.

SUPREME COURT. See also **Jurisdiction.**

1. Appointment of L. Ralph Mecham as Director of Administrative Office of United States Courts, p. 921.

2. Retirement of Alexander L. Stevas as Clerk, p. v.

3. Term statistics, p. 1324.

SUPREME COURT RULES. See **Racketeer Influenced and Corrupt Organizations Act,** 1.

TAKING OF PROPERTY FOR PUBLIC USE. See **Justiciability.**

TIMBER IN NATIONAL FORESTS. See **Stays,** 4.

UNIONS. See **National Labor Relations Act.**

UNITED STATES' LIABILITY FOR SERVICEMAN'S INJURY OR DEATH. See **Constitutional Law,** I, 2; **Federal Tort Claims Act; Jurisdiction.**

VACATION OF STAYS. See **Stays,** 4, 5.

VETERANS' BENEFITS. See **Constitutional Law,** I, 2; **Jurisdiction.**

VICTIM OF CRIME'S PRIVATE CIVIL ACTION. See **Racketeer Influenced and Corrupt Organizations Act.**

VIOLATIONS OF PROBATION. See **Interstate Agreement on Detainers.**

WAIVER OF STATES' IMMUNITY FROM SUIT. See **Constitutional Law,** VI.

WITNESSES. See **Constitutional Law**, I, 1.

WORDS AND PHRASES.

"Stolen, converted or taken by fraud." 18 U. S. C. § 2314. Dowling v. United States, p. 207.

ZONING REGULATIONS. See **Constitutional Law**, II; **Justiciability.**

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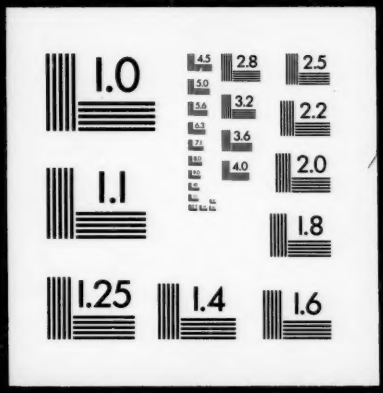
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